

CHIEF JUSTICE
HUGH ADAIR
Supreme Court
State of Montana

The Titles of This Code are
Arranged and Numbered as Follows

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| 2. Agency | 7. Building and Loan Associations |
| 3. Agriculture, Horticulture and Dairying | 8. Carriers and Carriage |
| 4. Alcoholic Beverages | 9. Cemeteries |
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1947

ANNOTATED

CONTAINING THE PERMANENT LAWS OF THE STATE IN
FORCE AT THE CLOSE OF THE THIRTIETH
LEGISLATIVE ASSEMBLY OF 1947

NINE VOLUMES

COMPILED, REVISED AND ANNOTATED

UNDER CHAPTER 184, LAWS OF 1945 AND CHAPTER 266, LAWS OF 1947,
AND PUBLISHED UNDER CHAPTER 43, LAWS OF 1947

I. W. Choate

Wesley W. Wertz

CODE COMMISSIONERS

VOLUME 6

Trade-Marks to Workmen's Compensation Act

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REVISED CODES OF MONTANA

1947

ANNOTATED

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NINE VOLUMES

Copyright, 1949

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COMPILED, REVISED AND ANNOTATED
UNDER CHAPTER 182, LAWS OF 1945 AND CHAPTER 286, LAWS OF 1947,
AND FURTHER LAWS (CHAPTER 43, LAWS OF 1947)

I. W. Choate

Wesley W. Wells

CODE COMMISSIONERS

VOLUME 8

Trade-Marks to Workmen's Compensation Act

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CHAPTER 1

TRADE-MARKS

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85-107. Penalties.

85-101. (4286) Trade-mark defined. The phrase "trade-mark," as used in this chapter, includes every description of word, letter, device, emblem, stamp, imprint, brand, printed ticket, label, or wrapper usually affixed by any mechanic, manufacturer, druggist, merchant, or tradesman, to denote any goods to be goods imported, manufactured, produced, compounded, or sold by him, other than any name, word, or expression generally denoting any goods to be of some particular class or description, or the designation or name for any mill, hotel, factory, or other business.

History: En. Sec. 3160, Pol. C. 1895; re-en. Sec. 2036, Rev. C. 1907; re-en. Sec. 4286, R. C. M. 1921. Cal. Pol. C. Sec. 3196.

Cross-References

Counterfeiting labels, penalty, sec. 94-35-231.

Dairy products, registration by dealers, sec. 3-2456.

Selling goods with counterfeit marks, penalty, sec. 94-35-227.

Union label, unauthorized use, secs. 94-35-231 to 94-35-235.

References

Cited or applied as section 2036, revised codes, in *Esselstyn v. Holmes*, 42 M 507, 514, 114 P 118.

Trade-Marks and Trade-Names and Unfair Competition—§ 1.

63 C.J. Trade-Marks and Trade-Names and Unfair Competition, § 1.

52 Am. Jur. 507, Trademarks, etc., § 2.

85-102. (4287) Use of trade-mark—how secured. Any person may record any trade-mark or name by filing with the secretary of state his claim to the same, and a copy or description of such trade-mark or name, with his affidavit attached thereto, certified to by any officer authorized to take acknowledgments of conveyances, setting forth that he, or the firm or corporation of which he is a member, is the exclusive owner, or agent of the owner, of such trade-mark or name.

History: En. Sec. 1, p. 103, L. 1899; 63 C.J. Trade-Marks and Trade-Names re-en. Sec. 2037, Rev. C. 1907; re-en. Sec. 4287, R. C. M. 1921. Cal. Pol. C. Sec. 3197.

52 Am. Jur. 518, Trademarks, etc., §§ 22 et seq.
Trade-Marks and Trade-Names and Unfair Competition—§ 43.

85-103. (4288) Record of trade-marks or names—fee. The secretary of state must keep for public examination, a record of all trade-marks or names filed in his office, with the date when filed and the name of the claimant, and must not record any two (2) like trade-marks or names; provided, however, that in the event that an affidavit, attested by two (2) witnesses, is filed in the office of the secretary of state to the effect that any trade-marks or name recorded therein in the name of any person or persons, corporation or association has not been used by such person or persons, corporation or association, their successors or assigns, for a period of five (5) years immediately preceding the filing of said affidavit, then and in that event the secretary of state is authorized, empowered and directed to record said trade-mark or name in the name of the person making application therefor in said affidavit, or in the name of the person or persons, corporation or association for whose benefit said application and affidavit are made, but without prejudice to any person claiming to be injured thereby to contest the same in any court of competent jurisdiction, within a period of six (6) months thereafter. He must, at the time of filing and recording a trade-mark or name, collect from the claimant a fee of three dollars (\$3.00).

History: En. Sec. 1, p. 103, L. 1899; re-en. Sec. 2038, Rev. C. 1907; re-en. Sec. 4288, R. C. M. 1921; amd. Sec. 1, Ch. 68, L. 1931. Cal. Pol. C. Sec. 3198.

NOTE.—This section fixing fee for recording trade-marks at \$3.00 held impliedly repealed by § 25-102 fixing fee at \$5.00 for recording and \$1.00 for issuing certificate.

Opinions of Attorney General Vol. 14, p. 73.

Trade-Marks and Trade-Names and Unfair Competition \Rightarrow 44.

63 C.J. Trade-Marks and Trade-Names and Unfair Competition § 140 et seq.

52 Am. Jur. 531, Trademarks, etc., §§ 39 et seq.

85-104. (4289) Who are owners of trade-marks—how transferred. Any person who has first adopted and used a trade-mark or name, whether within or beyond the limits of this state, is its original owner. Such ownership may be transferred in the same manner as personal property, and is entitled to the same protection by suits at law; and any court of competent jurisdiction may restrain, by injunction, any use of trade-marks or names in violation of this chapter.

History: En. Sec. 3163, Pol. C. 1895; re-en. Sec. 2039, Rev. C. 1907; re-en. Sec. 4289, R. C. M. 1921. Cal. Pol. C. Sec. 3199.

Cross-Reference

Injunction to protect union trade-mark, sec. 94-35-234.

Trade-Marks and Trade-Names and Unfair Competition \Rightarrow 26, 33.

63 C.J. Trade-Marks and Trade-Names and Unfair Competition §§ 31 et seq., 212 et seq.

52 Am. Jur. 520, Trademarks, etc., § 25 et seq.

85-105. (4290) Penalties. The penalty for forging, counterfeiting, or unlawful using of trade-marks is provided in section 94-35-226.

History: En. Sec. 3164, Pol. C. 1895; re-en. Sec. 2040, Rev. C. 1907; re-en. Sec. 4290, R. C. M. 1921.

References

Cited or applied as section 2040, revised codes, in *Esselstyn v. Holmes*, 42 M 507, 515, 114 P 118.

85-106. (4291) Marks and devices may be filed. Any person engaged in manufacturing, bottling, or selling soda, mineral, or aerated waters, cider, ginger ale, or other aerated, non-intoxicating beverages in bottles or siphons with his name or other marks or devices branded, stamped, engraved, etched,

blown, impressed, or otherwise produced upon such bottles or siphons, or the boxes used by him, may have a trade-mark for the same as provided in this chapter.

History: En. Sec. 3300, Pol. C. 1895; Trade-Marks and Trade-Names and Un-
re-en. Sec. 2103, Rev. C. 1907; re-en. Sec. fair Competition § 24.
4291, R. C. M. 1921. 63 C.J. Trade-Marks and Trade-Names
and Unfair Competition § 41 et seq.

85-107. (4292) Penalties. Every person who violates the provisions of the preceding section is punishable as provided in sections 94-35-226 and 94-35-230.

History: En. Sec. 3301, Pol. C. 1895;
re-en. Sec. 2104, Rev. C. 1907; re-en. Sec.
4292, R. C. M. 1921.

CHAPTER 2

FAIR TRADE ACT

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85-206. Unfair competition actionable.
85-207. Agreements excluded from act.
85-208. Act, how cited.

85-201. Definitions. The following terms, as used in this act, are hereby defined as follows:

- (a) "Commodity" means any subject of commerce.
- (b) "Producer" means any grower, baker, maker, manufacturer, bottler, packer, converter, processor or publisher.
- (c) "Wholesaler" means any person selling a commodity other than a producer or retailer.
- (d) "Retailer" means any person selling a commodity to consumers for use.
- (e) "Person" means an individual, a corporation, a partnership, an association, a joint-stock company, a business trust or any unincorporated organization.

History: En. Sec. 1, Ch. 42, L. 1937.

Trade-Marks and Trade-Names and Un-
fair Competition § 68(2).

Cross-Reference

Unfair practices act, secs. 51-101 to 51-118.

63 C.J. Trade-Marks, Trade-Names and
Unfair Competition § 100 et seq.

85-202. Permissible agreements in contracts for sale of labeled commodities. No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which commodity is in free and open competition with commodities of the same general class produced or distributed by others shall be deemed in violation of any law of the state of Montana by reason of any of the following provisions which may be contained in such contract:

- (a) That the buyer will not resell such commodity at less than the minimum price stipulated by the seller.

(b) That the buyer will require of any dealer to whom he may resell such commodity an agreement that he will not, in turn, resell at less than the minimum price stipulated by the seller.

(c) That the seller will not sell such commodity:

1. To any wholesaler, unless such wholesaler will agree not to resell the same to any retailer unless the retailer will, in turn, agree not to resell the same except to consumers for use and at not less than the stipulated minimum price, and such wholesaler will likewise agree not to resell the same to any other wholesaler unless such other wholesaler will make the same agreement with any wholesaler or retailer to whom he may resell; or

2. To any retailer, unless the retailer will agree not to resell the same except to consumers for use and at not less than the stipulated minimum price.

History: En. Sec. 2, Ch. 42, L. 1937. 52 Am. Jur. 643, Trademarks, etc., §§ 173-197.

85-203. Acts violating minimum resale price provisions. For the purpose of preventing evasion of the resale price restrictions imposed in respect of any commodity by any contract entered into pursuant to the provisions of this act (except to the extent authorized by the said contract):

(a) The offering or giving of any article of value in connection with the sale of such commodity;

(b) The offering or the making of any concession of any kind whatsoever (whether by the giving of coupons or otherwise) in connection with any such sale; or

(c) The sale or offering for sale of such commodity in combination with any other commodity, shall be deemed a violation of such resale price restriction, for which the remedies prescribed by section 85-206 shall be available.

History: En. Sec. 3, Ch. 42, L. 1937.

85-204. Who may establish minimum resale price. No minimum resale price shall be established for any commodity, under any contract entered into pursuant to the provisions of this act, by any person other than the owner of the trade-mark, brand or name used in connection with such commodity or by a distributor specifically authorized to establish said price by the owner of such trade-mark, brand or name used in connection with such commodity or by a distributor specifically authorized to establish said price by the owner of such trade-mark, brand or name.

History: En. Sec. 4, Ch. 42, L. 1937.

85-205. When minimum resale price not binding. No contract containing any of the provisions enumerated in section 85-202 shall be deemed to preclude the resale of any commodity covered thereby without reference to such contract in the following cases:

(a) In closing out the owner's stock for the bona fide purpose of discontinuing dealing in any such commodity and plain notice of the fact is given to the public; provided the owner of such stock shall give to the producer or distributor of such commodity prompt and reasonable notice in

writing of his intention to close out said stock, and an opportunity to purchase such stock at the original invoice price;

(b) When the trade-mark, brand or name is removed or wholly obliterated from the commodity and is not used or directly or indirectly referred to in the advertisement or sale thereof;

(c) When the goods are altered, second-hand, damaged or deteriorated and plain notice of the fact is given to the public in the advertisement and sale thereof, such notice to be conspicuously displayed in all advertisements and to be affixed to the commodity;

(d) By any officer acting under an order of court.

History: En. Sec. 5, Ch. 42, L. 1937.

85-206. Unfair competition actionable. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the stipulated price in any contract entered into pursuant to the provisions of this act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

History: En. Sec. 6, Ch. 42, L. 1937.

85-207. Agreements excluded from act. This act shall not apply to any contract or agreement between or among producers or distributors or between or among wholesalers or between or among retailers as to sale or resale prices.

History: En. Sec. 7, Ch. 42, L. 1937.

85-208. Act, how cited. This act may be known and cited as the "Fair Trade Act".

History: En. Sec. 10, Ch. 42, L. 1937.

TITLE 86

TRUSTS AND USES

- Chapter 1. Trusts and uses in relation to real property, 86-101 to 86-115.
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3. Trustee's obligations—sale, mortgage or lease of trust property, 86-301 to 86-326.
4. Trusts for benefit of third persons—nature and creation, 86-401 to 86-406.
5. Trusts for benefit of third persons—obligations, powers and rights of trustees, 86-501 to 86-512.
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CHAPTER 1

TRUSTS AND USES IN RELATION TO REAL PROPERTY

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86-110. Title of grantee of trust property.
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86-112. Transfer by beneficiary of interest in trust forbidden.
86-113. Effect of omitting trust in conveyance.
86-114. Certain sales, etc., by trustees, void.
86-115. When estate of trustee to cease.

86-101. (6783) What uses and trusts may exist. Uses and trusts in relation to real property are those only which are specified in this chapter.


History: En. Sec. 1310, Civ. C. 1895;
re-en. Sec. 4536, Rev. C. 1907; re-en. Sec.
6783, R. C. M. 1921. Cal. Civ. C. Sec. 847.

References

Whitecomb v. Koechel, 117 M 329, 333,
158 P 2d 496.

Statutes To Be Construed Together

In determining what constitutes a trust and the manner of its creation, secs. 86-101, 86-102, 86-105 and 86-207 must be construed together. Hodgkiss v. Northland Petroleum Consolidated, 104 M 328, 340, 57 P 2d 811.

Trustee  5.

65 C.J. Trusts § 7 et seq.

54 Am. Jur. 1, Trusts.

86-102. (6784) Creation of trusts. No trust in relation to real property is valid unless created or declared:

1. By a written instrument, subscribed by the trustee, or by his agent thereto authorized by writing;

2. By the instrument under which the trustee claims the estate affected;
or,

3. By operation of law.

History: En. Sec. 1311, Civ. C. 1895;
re-en. Sec. 4537, Rev. C. 1907; re-en. Sec.

6784, R. C. M. 1921. Cal. Civ. C. Sec. 852.
Field Civ. C. Sec. 280.

Cross-Reference

Use of word "trustee" alone in conveyance, effect, sec. 73-206.

Constructive Trust

A constructive trust is created by operation of law, upon breach of a fiduciary relation by the person sought to be held, *Eisenberg v. Goldsmith*, 42 M 563, 577, 113 P 1127.

Id. Evidence held insufficient to show a constructive trust.

A constructive trust is created by operation of law, upon breach of a fiduciary relation by the person sought to be held, its basis being fraud, actual or constructive. *MacGinniss Realty Co. v. Hinderager*, 63 M 172, 184, 206 P 436.

The basis of a constructive trust is fraud, and such a trust arises when the legal title to property is obtained by a person in violation of some duty owed to the one who is equitably entitled thereto, the property being held in hostility to his beneficial rights of ownership. *Word v. Moore*, 66 M 550, 555 et seq., 214 P 79.

Id. Where a contract between the assignee of a mortgage on land and a lessee under a lease from the heirs of the mortgagors imposed no legal obligation whatever upon the lessee owing to the assignee, but simply gave him an option to purchase the land during the term of the lease upon foreclosure, provided the lessee would pay the taxes and interest due, and the mortgage was not foreclosed, and the lessee paid neither taxes nor interest but bought in the property on tax sale, a constructive trust in the land in favor of the assignee did not arise, under the preceding paragraph, the lessee not having violated any duty owing by him to defendant.

Where property had been transferred and retransferred between members of the same family and by a partnership to a corporation composed of the same persons, all without any consideration being paid, and purchased by plaintiff at a bankruptcy sale, and on which defendant had a prior judgment lien, contention that one of the grantees was a trustee of a constructive trust, held not sustained by the evidence, it showing neither actual nor constructive fraud on the part of the alleged trustee. *McLaughlin v. Corcoran*, 104 M 590, 597, 69 P 2d 597.

Elements in General of a Trust

An instrument claimed by plaintiff to have created an express trust in real property in his favor, which neither indicated an intention on the part of the plaintiff to create a trust nor showed that defendant was accepting, or acknowledging the existence of, one, nor the purpose of its creation, nor what disposition defendant was

to make of the property, was insufficient to constitute the latter a trustee as alleged. *Mantle v. White*, 47 M 234, 244, 132 P 22.

Necessity for Writing in an Express Trust

An express trust cannot be based upon an oral agreement. *Lynch v. Herrig*, 32 M 267, 277, 80 P 240.

Where, in an action to compel a reconveyance of certain trust property on the ground that the purpose of the trust had been fully accomplished, defendant in his answer recognized the original contract by which the trust was created and the property conveyed as valid, but set up title to the property by virtue of a subsequent contract, he could not thereafter contend that the original contract was void because not in writing. *Willoburn Ranch Co. v. Yegen*, 49 M 101, 109, 140 P 231.

Parol Express Trusts — Sufficiency of Moral Obligation as Consideration

As applied to a parol express trust, unenforceable under this section, a moral obligation is a sufficient consideration for the transfer of realty to prevent creditors, who have not acquired a valid lien thereon prior to the transfer from having it set aside. *McLaughlin v. Corcoran*, 104 M 590, 601, 69 P 2d 597.

Resulting Trust (see also next section)

To raise a resulting trust in land the consideration for its purchase must have been paid at the time or before the legal title to it passed to the party sought to be charged in the trust capacity, payments made thereafter being insufficient for that purpose. *MacGinniss Realty Co. v. Hinderager*, 63 M 172, 184, 206 P 436.

Since a resulting trust in realty arises, not out of a contract, but by operation of law, it may be proved by parol evidence, the statute of frauds not applying. *Wilson v. Wilson et al.*, 64 M 533, 543, 210 P 896.

Where in an action to quiet title to land, defendant assignee of a mortgage thereon claimed that the land was held by plaintiff in trust for his benefit, but did not allege that the consideration which plaintiff paid to the mortgagor was paid in behalf of defendant and the title thus acquired taken in the name of plaintiff for defendant's use and benefit, his pleading did not state cause of action as for a resulting trust. *Word v. Moore*, 66 M 550, 555 et seq., 214 P 79.

Statutes To Be Construed Together

In determining what constitutes a trust and the manner of its creation, secs. 86-101, 86-102, 86-105 and 86-207 must be construed together. *Hodgkiss v. Northland*

Petroleum Consolidated, 104 M 328, 340,
57 P 2d 811.

References

Whitecomb v. Koechel, 117 M 329, 333,
158 P 2d 496.

Trusts 5, 17-22, 62, 91.

65 C.J. Trusts §§ 32 et seq., 43, 52, 58.

54 Am. Jur. 33, Trusts, §§ 15 et seq.

86-103. (6785) Transfer to one for money paid by another—trust presumed. When a transfer of real property is made to one person, and the consideration thereof is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made.

History: En. Sec. 1312, Civ. C. 1895; re-en. Sec. 4538, Rev. C. 1907; re-en. Sec. 6785, R. C. M. 1921. Cal. Civ. C. Sec. 853. Field Civ. C. Sec. 281.

Conveyances Between Persons in Confidential Relationships

The rule declared by this section that where real property is conveyed to one person and the consideration therefor is paid by another, a trust is presumed to result in favor of the person paying the consideration, held, subject to the exception that where the property is purchased by one with his own money and the title is placed by him in another to whom he stands in a confidential relation, such as husband, wife, parent, child, etc., the presumption, rebuttable in character, is that the conveyance is made as a gift. *Clary v. Fleming*, 60 M 246, 250, 198 P 546; *Humbird et al. v. Arnet et al.*, 99 M 499, 44 P 2d 756.

Id. Where it is sought to establish a resulting trust by reason of a conveyance made by or on behalf of a husband to his wife, the evidence establishing such trust must be clear, convincing and practically free from doubt, especially so where the wife is dead and the husband must establish his case by his own testimony, as to oral conversations between himself and deceased.

Where property is purchased by one with his own money and the title is placed by him in another with whom he stands in confidential relation, such as husband, wife, parent, child or such other relation that the grantee may naturally have a claim upon the bounty of the grantor, the presumption, rebuttable in character, is that the conveyance is made as a gift. *McQuay v. McQuay*, 81 M 311, 319, 263 P 683.

See also *Roman v. Albert et al.*, 81 M 393, 406, 264 P 115.

The owner of lands mortgaged for a large amount conveyed them to a bank which subsequently became insolvent. Its receiver deeded them to his mother-in-law for an indeterminate amount of between two and five hundred dollars handed him by his wife, ostensibly in behalf of her mother. In an action to foreclose the

mortgage, to have the grantee declared a trustee of a resulting trust and several later conveyances set aside as fraudulent, held, that the money paid was that of the grantor and that, therefore, the grantee at once upon consummation of the transaction became such trustee, her only interest in the property until she made conveyance thereof being that of a holder of the legal title for the benefit of the grantor. *Humbird et al. v. Arnet et al.*, 99 M 499, 510, 44 P 2d 756.

The rule expressed in this section is subject to the exception that if the consideration is paid by one in close relationship to the transferee, such as husband and wife, parent and child, the rebuttable presumption that the transaction was a gift arises; such exception applying where the grantee is the grantor's son-in-law. *McLaughlin v. Coreoran*, 104 M 590, 595, 69 P 2d 597.

Where the parties to a transaction of the nature adverted to by this section stand in close relationship, such as husband and wife, the presumption of a trust is supplanted by that of a gift. *Bingham v. National Bank of Montana*, 105 M 159, 166, 72 P 2d 90.

Where defendant husband in a divorce action prayed that the family home be adjudged to him on the ground that, although standing in his wife's name he had paid for it, thus seeking to establish a trust, it was incumbent upon him to overcome the presumption that where the husband pays the consideration and title is taken in his wife's name, the transaction constitutes a gift; and where he delayed for 26 years to make serious claim of title, the court's finding for the wife may not be held abuse of discretion. *Lewis v. Lewis*, 109 M 42, 49, 94 P 2d 211.

Ordinarily where a conveyance is made to one person, and the consideration is paid by another, a trust is presumed in favor of the latter, under this section. But this presumption is not indulged where, as in the instant case, the conveyance is made by the husband to the wife. In such case the presumption, disputable in character, is that the transfer was intended as a gift. *Lewis v. Bowman*, 113 M 68, 77, 121 P 2d 162.

In an action by a judgment creditor to set aside an alleged fraudulent transfer of real property made by husband to wife the day before judgment was rendered, it appeared that ever since purchase thereof 15 years before with the wife's money she had the equitable title thereto, bare legal title having been placed by mistake in the husband, held, that the gift presumption is rebuttable, and property purchased with the wife's money becomes part of her separate estate, and her separate equitable estate is not subject to execution under levy by the husband's creditors. (No showing that creditor was misled and injured by title so long remaining.) *Kranjee v. Belinak*, 114 M 26, 30, 132 P 2d 150.

Created by Operation of Law

A resulting trust arises by operation of law, from the fact that the consideration for the purchase of property was paid by, or on behalf of, one person, and the title thereto taken in the name of another. *Eisenberg v. Goldsmith*, 42 M 563, 573, 113 P 1127.

When a transfer of real property is made to one person and the consideration therefor is paid by or for another, a trust is presumed to result in favor of him by or for whom such payment is made; such resulting trust is created by operation of law, and not by contract, and may be proved by parol evidence. *McQuay v. McQuay*, 81 M 311, 319, 263 P 683.

Declaratory of Common Law

This statute is but declaratory of the common law. *Lynch v. Herrig*, 32 M 267, 274, 80 P 240. See *Eisenberg v. Goldsmith*, 42 M 563, 573, 113 P 1127.

Doctrine Applicable to Personal Property

Held, that the provision of this section declaring that a trust is presumed to result in favor of a person by or for whom the consideration for the transfer of real property is paid by another, being but declaratory of the common law under which the rule applied as well as the purchase of personal property, is controlling also where the property in question is personal. *Meagher v. Harrington*, 78 M 457, 469, 254 P 432.

Complaint for writ of mandate by a county high school against the county treasurer to compel payment of money realized from the sale of a building purchased with high school funds and sold by county commissioners as trustee when no longer needed for school purposes, held to have stated a cause of action on the theory of a resulting trust, although the pleading did not ask that such a trust be declared, and was sufficient to authorize issuance of the writ directing defendant

to deposit the sale price to the credit of plaintiff; incorporation as a county high school district after purchase of building did not affect its right. *State ex rel. Gallatin County High School v. Brandenburg*, 107 M 199, 202, 82 P 2d 593.

Id. A resulting trust does not spring from a contract between the parties but arises from a breach of law and the acts of the parties.

Under this section where a transfer of realty is made by one person and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made, the trust being created by operation of law; hence the contention that a trust estate in real property can be created only by an instrument in writing under statute of frauds is not meritorious. *Whitecomb v. Koechel*, 117 M 329, 333, 158 P 2d 496.

Effect of Laches

In an action in ejectment in which defendant sought to establish a resulting trust in property conveyed to his wife, the consideration for which was paid by him, held, that by waiting ten years before asserting his claim, the wife in the interim having secured a divorce, remarried and died, she in her lifetime paying the taxes, rented and in every way treated it as her own, he was guilty of such laches as precluded his right to appeal to a court of equity for relief. *Clary v. Fleming*, 60 M 246, 250, 198 P 546.

See also *First State Bank v. Mussigbrod et al.*, 83 M 68, 92, 271 P 695.

Payment Must be Made from Money of Beneficiary

The one fundamental idea running through this section is that the money paid was in fact the money of the person who claims the existence and benefit of the trust. It is immaterial whether the payment was made by him personally or for him by another; but in either instance the payment must have been made with his money. *Eisenberg v. Goldsmith*, 42 M 563, 574, 113 P 1127; *Stauffer v. Great Falls P. S. Co. et al.*, 99 M 324, 43 P 2d 647; *Humbird et al. v. Arnet et al.*, 99 M 499, 44 P 2d 756.

Where, after the death of a mortgagor of real property, the cashier of a bank advised his widow to permit the property to be sold on foreclosure sale, and that he, acting for the bank, would buy it in for her benefit, the money so advanced to be deemed a loan to her, and she acted upon such advice, a resulting trust was created in her favor. *Marcellus v. Wright*, 51 M 559, 563, 154 P 714.

To create a resulting trust in real prop-

erty, under this section, it is not necessary that the person for whose benefit a conveyance (assignment of sheriff's certificate of sale) is made must pay the money; if it is advanced by another for or on his behalf it is sufficient. *McKenzie v. Evans et al.*, 96 M 1, 29 P 2d 657.

Property Acquired with Partnership Funds Creates Trust

Where one of three partners engaged in the livestock business acquired patent to desert land used in the business and paid for it with partnership funds, the land was impressed with a resulting trust in favor of the three partners. *Wilson v. Wilson et al.*, 64 M 533, 543, 210 P 896.

Time of Payment of Consideration as Affecting Trust

To create a resulting trust, the payment of the money as the consideration for the purchase of the property must have been made at the time or before the legal title passed to the party sought to be charged in the trust capacity. *Lynch v. Herrig*, 32 M 267, 275, 80 P 240; *Eisenberg v. Goldsmith*, 42 M 563, 575, 113 P 1127.

To raise a resulting trust in land the consideration for its purchase must have been paid at the time or before the legal title to it passed to the party sought to be charged in the trust capacity, payments made thereafter being insufficient for that

purpose. *MacGinniss Realty Co. v. Hinderager*, 63 M 172, 184, 206 P 436.

While in order to raise a resulting trust, the payment of the money as the consideration for the purchase of the property must have been made at the time or before the legal title to it passes to the party to be charged in the trust capacity, the fact that the contract of purchase entered into by defendant antedated the passing of title some weeks was immaterial. *Feeley v. Feeley*, 72 M 84, 92, 231 P 908.

The rule that to establish a resulting trust in real property the consideration must have been paid at the time, or before the time, the legal title passes, held to have been met where foreign co-owners who had executed powers of attorney to their resident co-owner claimed a resulting trust in their favor in lands exchanged by their trustee for others included in a mortgage with knowledge of their trust character, equity and good conscience demanding that, under the circumstances, such consideration as they furnished should be considered as furnished in time to create a trust. *First State Bank v. Mussigbrod et al.*, 83 M 68, 92, 271 P 695.

References

In re Estate of Deschamps, 65 M 207, 212, 212 P 512.

54 Am. Jur. 158, Trusts, §§ 203 et seq.

86-104. (6786) Purchasers protected. No implied or resulting trust can prejudice the rights of a purchaser or encumbrancer of real property for value and without notice of the trust.

History: En. Sec. 1313, Civ. C. 1895; re-en. Sec. 4539, Rev. C. 1907; re-en. Sec. 6786, R. C. M. 1921. Cal. Civ. C. Sec. 856. Field Civ. C. Sec. 284.

Cross-Reference

Bona fide purchaser not affected by implied trust, sec. 73-206.

Operation and Effect

The rule, that a wife has no dower in trust property or in estates lost by breach of condition, cannot be avoided on the theory that the dower right, coming to the wife by virtue of marriage, is an interest acquired by purchase, and therefore not to be prejudiced by a trust of which the wife had no knowledge at the time of the marriage. *Huffine v. Lincoln*, 52 M 585, 594, 160 P 820.

Id. If a trust has been established in property standing in the name of a husband, his wife has, prima facie, no dower; she can have it only by showing a want of notice.

An attaching creditor is neither a purchaser nor an encumbrancer of real property for value within the meaning of this section, declaring that no resulting trust can prejudice the rights of such purchaser or encumbrancer; he succeeds to and acquires only the rights of the debtor at the time of the levy, subject to all the rights and equities of third persons which are capable of being enforced against the judgment debtor; the rule of caveat emptor applies. *Stauffer v. Great Falls P. S. Co. et al.*, 99 M 324, 43 P 2d 647.

Trusts—355-357.

65 C.J. Trusts § 910 et seq.

86-105. (6787) For what purposes express trusts may be created. Express trusts may be created for any of the following purposes:

1. To sell real property, and apply or dispose of the proceeds in accordance with the instrument creating the trust;

2. To mortgage or lease real property for the benefit of annuitants or other legatees, or for the purpose of satisfying any charge thereon;

3. To receive the rents and profits of real property, and pay them to or apply them to the use of any person, whether ascertained at the time of the creation of the trust or not, for himself or for his family, during the life of such person, or for any shorter term, subject to the rules of sections 67-502 to 67-611; or,

4. To receive the rents and profits of real property, and to accumulate the same for the purposes and within the limits prescribed by the sections above enumerated.

History: En. Sec. 1314, Civ. C. 1895; re-en. Sec. 4540, Rev. C. 1907; re-en. Sec. 6787, R. C. M. 1921. Cal. Civ. C. Sec. 857. Based on Field Civ. C. Sec. 285.

Statutes to be Construed Together

In determining what constitutes a trust and the manner of its creation, secs. 86-101, 86-102, 86-105, and 86-207 must be construed together. *Hodgkiss v. Northland Petroleum Consolidated*, 104 M 328, 340, 57 P 2d 811.

Operation and Effect

A will devising one-half of the residuary estate to a trustee with directions to pay

income to testator's daughter for a certain period, and directing trustee to "convey and transfer the corpus" as provided therein, was not invalid under this section as being a trust to convey. In *re Strode's Estate*, ___ M ___, 167 P 2d 579, 582.

Id. Testator creating a trust and having the right to say to whom the real property shall belong may also provide in the trust that the trustee at the termination thereof shall convey the property.

Trusts⊃11.

65 C.J. Trusts § 26 et seq.

54 Am. Jur. 37, Trusts, §§ 19, 20.

86-106. (6788) Profits of land liable to creditors in certain cases.

When a trust is created to receive the rents and profits of real property, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum that may be necessary for the education and support of the persons for whose benefit the trust is created, is liable to the claims of the creditors of such person, in the same manner as personal property which cannot be reached by execution.

History: En. Sec. 1315, Civ. C. 1895; re-en. Sec. 4541, Rev. C. 1907; re-en. Sec. 6788, R. C. M. 1921. Cal. Civ. C. Sec. 859. Field Civ. C. Sec. 287.

Trusts⊃150-152.

65 C.J. Trusts § 307.

86-107. (6789) Vested power, execution of. Where a power is vested in several persons, all must unite in its execution; but, in case any one or more of them are dead, the power may be executed by the survivor or survivors, unless otherwise prescribed by the terms of the power.

History: En. Sec. 1316, Civ. C. 1895; re-en. Sec. 4542, Rev. C. 1907; re-en. Sec. 6789, R. C. M. 1921. Cal. Civ. C. Sec. 860. Field Civ. C. Sec. 323.

ness of the trust which requires the exercise of judgment or discretion. *Petroleum Co. v. G. Campbell-Kevin Synd.*, 75 M 261, 270, 242 P 540. See also *Williard et al. v. Campbell Oil Co. et al.*, 77 M 30, 40, 248 P 219.

Operation and Effect

The trustees are not merely agents who act independently one of another. They constitute a board and they can act only as a unit in the disposition of any busi-

Powers⊃30.

49 C.J. Powers § 93.

86-108. (6790) Trustees of express trusts to have whole estate. Except as hereinafter otherwise provided, every express trust in real property, valid as such in its creation, vests the whole estate in the trustees, subject only

to the execution of the trust. The beneficiaries take no estate or interest in the property, but may enforce the performance of the trust.

History: En. Sec. 1317, Civ. C. 1895; **References**
re-en. Sec. 4543, Rev. C. 1907; re-en. Sec. In re Strode's Estate, ___ M ___, 167 P
6790, R. C. M. 1921. Cal. Civ. C. Sec. 863. 2d 579, 583.
Field Civ. C. Sec. 291.

Trusts—134-136, 140, 336.
65 C.J. Trusts §§ 272 et seq., 873 et seq.

86-109. (6791) Authority of author over trust property. Notwithstanding anything contained in the last section, the author of a trust may, in its creation, prescribe to whom the real property to which the trust relates shall belong, in the event of the failure or termination of the trust, and may transfer or devise such property, subject to the execution of the trust.

History: En. Sec. 1318, Civ. C. 1895; **References**
re-en. Sec. 4544, Rev. C. 1907; re-en. Sec. In re Strode's Estate, ___ M ___, 167 P
6791, R. C. M. 1921. Cal. Civ. C. Sec. 864. 2d 579, 583.
Field Civ. C. Sec. 292.

Trusts—51, 153.
65 C.J. Trusts §§ 94 et seq., 323 et seq.

86-110. (6792) Title of grantee of trust property. The grantee or devisee of real property subject to a trust acquires a legal estate in the property, as against all persons except the trustees and those lawfully claiming under them.

History: En. Sec. 1319, Civ. C. 1895; **References**
re-en. Sec. 4545, Rev. C. 1907; re-en. Sec. Cited or applied as section 4545, Revised
6792, R. C. M. 1921. Cal. Civ. C. Sec. 865. Codes, in Barker v. Edwards, 259 Fed. 484,
Field Civ. C. Sec. 293. 489.

86-111. (6793) Interests remaining in grantor of express trust. Where an express trust is created in relation to real property, every estate not embraced in the trust, and not otherwise disposed of, is left in the author of the trust or his successors.

History: En. Sec. 1320, Civ. C. 1895; 6793, R. C. M. 1921. Cal. Civ. C. Sec. 866.
re-en. Sec. 4546, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 294.

86-112. (6794) Transfer by beneficiary of interest in trust forbidden. The beneficiary of a trust for the receipt of the rents and profits of real property, or for the payment of an annuity out of such rents and profits, cannot transfer or in any manner dispose of his interest in such trust.

History: En. Sec. 1321, Civ. C. 1895; Trusts—146-149.
re-en. Sec. 4547, Rev. C. 1907; re-en. Sec. 65 C.J. Trusts § 303 et seq.
6794, R. C. M. 1921. Cal. Civ. C. Sec. 867.
Based on Field Civ. C. Secs. 295 and 296.

86-113. (6795) Effect of omitting trust in conveyance. Where an express trust is created in relation to real property, but is not contained or declared in the grant to the trustee, or in an instrument signed by him, and recorded in the office with the grant to the trustee, such grant must be deemed absolute in favor of purchasers from such trustee without notice, and for a valuable consideration.

History: En. Sec. 1322, Civ. C. 1895; **NOTE.**—See Ch. 64, L. 1943, Sec. 73-206
re-en. Sec. 4548, Rev. C. 1907; re-en. Sec. of this code, as to effect of designating a
6795, R. C. M. 1921. Cal. Civ. C. Sec. 869. grantee as "trustee," without setting forth
Based on Field Civ. C. Sec. 297. the terms of the trust.

Trusts 172-237, 357. 65 C.J. Trusts §§ 526 et seq., 911 et seq.

86-114. (6796) Certain sales, etc., by trustees, void. Where a trust in relation to real property is expressed in the instrument creating the estate, every transfer or other act of the trustee, in contravention of the trust, is absolutely void.

History: En. Sec. 1323, Civ. C. 1895; re-en. Sec. 4549, Rev. C. 1907; re-en. Sec. 6796, R. C. M. 1921. Cal. Civ. C. Sec. 870. Field Civ. C. Sec. 298.

Operation and Effect

However this section be viewed, it is perfectly clear that not all conveyances by

such trustees are prima facie void or voidable. They are void or voidable only if made in contravention of the trust, and as this presumably is not the character of any given conveyance, the burden is necessarily upon him who asserts to prove that such is its character. *Horsky v. McKennan*, 53 M 50, 57, 162 P 376.

86-115. (6797) When estate of trustee to cease. When the purpose for which an express trust was created ceases, the estate of the trustee also ceases.

History: En. Sec. 1324, Civ. C. 1895; re-en. Sec. 4550, Rev. C. 1907; re-en. Sec. 6797, R. C. M. 1921. Cal. Civ. C. Sec. 871. Field Civ. C. Sec. 299.

Trusts 133-136.
65 C.J. Trusts § 372 et seq.

CHAPTER 2

TRUSTS IN GENERAL—NATURE AND CREATION

- Section 86-201. Trusts classified.
86-202. Voluntary trust defined.
86-203. Involuntary trust defined.
86-204. Parties to the contract.
86-205. What constitutes one a trustee.
86-206. For what purpose a trust may be created.
86-207. Voluntary trust—how created as to trustor.
86-208. How created as to trustee.
86-209. Involuntary trustee, who is.
86-210. Involuntary trust resulting from fraud, etc.

86-201. (7878) Trusts classified. A trust is either:

1. Voluntary; or,
2. Involuntary.

History: En. Sec. 2950, Civ. C. 1895; re-en. Sec. 5364, Rev. C. 1907; re-en. Sec. 7878, R. C. M. 1921. Cal. Civ. C. Sec. 2215. Field Civ. C. Sec. 1167.

132 P 22; *Call v. Mareum*, 62 M 73, 203 P 855; *Meagher v. Harrington*, 78 M 457, 469, 254 P 432; *Lewis v. Bowman*, 113 M 68, 76, 121 P 2d 162.

References

Cited or applied as section 5364, Revised Codes, in *Mantle v. White*, 47 M 234, 241,

Trusts 1, 62, 91, 129.
65 C.J. Trusts §§ 7, 139, 215, 266.
54 Am. Jur. 22, Trusts, § 5.

86-202. (7879) Voluntary trust defined. A voluntary trust is an obligation arising out of a personal confidence reposed in, and voluntarily accepted by, one for the benefit of another.

History: En. Sec. 2951, Civ. C. 1895; re-en. Sec. 5365, Rev. C. 1907; re-en. Sec. 7879, R. C. M. 1921. Cal. Civ. C. Sec. 2216. Field Civ. C. Sec. 1168.

Operation and Effect

An agreement between preferred stockholders that each should lend a certain

proportion of a sum of money to the corporation, and that certain shares of common stock held by one of their number in trust for distribution as a bonus to parties lending such money should immediately upon making the loan become the property of the lenders, and be divided according to the proportion of said sum

lent by each, did not create a trust nor make the holder of the certificates of stock a trustee for the benefit of his fellow-signers; nor does the mere fact that the holder of the stock retained possession of the certificates representing such stock as a mere stakeholder make him such a trustee. *Crosby v. Robbins*, 56 M 179, 190, 182 P 122; *Asbury v. Robbins*, 56 M 195, 182 P 126; *Hanson v. Robbins*, 56 M 196, 182 P 126.

A voluntary trust may be created orally when the subject matter is personal property; it is a device by which the donor effectuates a gift either of property or of its beneficial use and enjoyment to a designated donee. *Stagg v. Stagg*, 90 M 180, 188, 300 P 539.

Id. Where a mother upon her death-bed delivered a quantity of jewelry to her daughter-in-law with instruction to turn it over to her surviving husband to be in

turn delivered to their sons when old enough to appreciate the gift, the result of the transaction was the creation of a voluntary trust, which was not terminated by the death of the father before the trust was executed, the court in such a case having power to appoint a trustee to carry it out.

References

Cited or applied as section 2951, Civil Code, in *McDonald v. American Nat. Bank*, 25 M 456, 494, 65 P 896; as section 5365, Revised Codes, in *Mantle v. White*, 47 M 234, 241, 132 P 22; *Montana-Wyoming Assn. v. Commercial Bk.*, 80 M 174, 179, 259 P 1060; *Conley et al. v. Johnson et al.*, 101 M 376, 383, 54 P 2d 585.

Trusts—1.

65 C.J. Trusts §§ 7, 17.

86-203. (7880) Involuntary trust defined. An involuntary trust is one which is created by operation of law.

History: En. Sec. 2952, Civ. C. 1895; re-en. Sec. 5366, Rev. C. 1907; re-en. Sec. 7880, R. C. M. 1921. Cal. Civ. C. Sec. 2217. Field Civ. C. Sec. 1169.

Resulting or Constructive Trusts

Involuntary trusts are either resulting or constructive trusts. Under sec. 86-103, when a transfer of real property is made to one person, and the consideration thereof is paid by another, the trust presumed to result in favor of the person by whom such payment is made is called a resulting trust. Such presumption is not in-

dulged where as in the instant case, the conveyance is made by the husband to the wife. In such case the presumption, disputable in character, is that the transfer was intended as a gift. *Lewis v. Bowman*, 113 M 68, 76, 121 P 2d 162.

References

Cited or applied as sec. 5366, Revised Codes, in *Mantle v. White*, 47 M 234, 241, 132 P 22; *Meagher v. Harrington*, 78 M 457, 469, 254 P 432; *Montana-Wyoming Assn. v. Commercial Bk.*, 80 M 174, 179, 259 P 1060.

86-204. (7881) Parties to the contract. The person whose confidence creates the trust is called the trustor; the person in whom confidence is reposed is called the trustee; and the person for whose benefit the trust is created is called the beneficiary.

History: En. Sec. 2953, Civ. C. 1895; re-en. Sec. 5367, Rev. C. 1907; re-en. Sec. 7881, R. C. M. 1921. Cal. Civ. C. Sec. 2218. Field Civ. C. Sec. 1170.

References

Cited or applied as section 2953, Civil Code, in *McDonald v. American Nat. Bank*, 25 M 456, 494, 65 P 896; as section 5367,

Revised Codes, in *Willoburn Ranch Co. v. Yegen*, 45 M 254, 259, 122 P 915; *Mantle v. White*, 47 M 234, 241, 132 P 22; *Petroleum Co. v. G. Campbell-Kevin Synd.*, 75 M 261, 270, 242 P 540.

Trusts—121-124.

65 C.J. Trusts §§ 256 et seq.

86-205. (7882) What constitutes one a trustee. Every person who voluntarily assumes a relation of personal confidence with another is deemed a trustee, within the meaning of this chapter, not only as to the person who reposes such confidence, but also as to all persons of whose affairs he thus acquires information which was given to such person in the like confidence, or over whose affairs he, by such confidence, obtains any control.

History: En. Sec. 2954, Civ. C. 1895; re-en. Sec. 5368, Rev. C. 1907; re-en. Sec. 7882, R. C. M. 1921. Cal. Civ. C. Sec. 2219. Field Civ. C. Sec. 1171.

Operation and Effect

The term "fiduciary or confidential relation" is one founded upon trust or confidence reposed by one person in the integrity and fidelity of another, and precludes the idea of profit or advantage resulting from the dealings of the parties and the person in whom the confidence is reposed. In such relation the party in whom the confidence is reposed, if he voluntarily accepts it, may take no advantage

of the other party without the latter's knowledge or consent. *Kerrigan v. O'Meara*, 71 M 1, 6, 227 P 819.

References

Roecher v. Story, 91 M 28, 44, 5 P 2d 205.

Trusts—123.

65 C.J. Trusts § 258.

86-206. (7883) For what purpose a trust may be created. A trust may be created for any purpose for which a contract may lawfully be made, except as otherwise prescribed by the chapters on uses and trusts and on transfers.

History: En. Sec. 2955, Civ. C. 1895; re-en. Sec. 5369, Rev. C. 1907; re-en. Sec. 7883, R. C. M. 1921. Cal. Civ. C. Sec. 2220. Field Civ. C. Sec. 1172.

Trust Invalid if Designed to Circumvent a Rule of Law for a Purpose Contrary to Public Policy

Where a collection agent took assignments of claims against a debtor "in trust" and brought suit thereon as trustee of express trusts, and it was admitted that this procedure was employed to avoid the rule that an assignment for collection does not

constitute the assignee the real party in interest, held: the trusts were invalid as contrary to public policy being designed to avoid a rule of law. *Streedbeck v. Benson*, 107 M 110, 113, 80 P 2d 861.

References

Department of Agriculture etc. v. DeVore, 91 M 47, 61, 6 P 2d 125.

Trusts—11.

65 C.J. Trusts § 26 et seq.

54 Am. Jur. 37, Trusts, §§ 19, 20.

86-207. (7884) Voluntary trust—how created as to trustor. Subject to the provisions of section 86-102, a voluntary trust is created, as to the trustor and beneficiary, by any words or acts of the trustor, indicating with reasonable certainty:

1. An intention on the part of the trustor to create a trust; and,
2. The subject, purpose and beneficiary of the trust.

History: En. Sec. 2956, Civ. C. 1895; re-en. Sec. 5370, Rev. C. 1907; re-en. Sec. 7884, R. C. M. 1921. Cal. Civ. C. Sec. 2221. Field Civ. C. Sec. 1173.

Operation and Effect

The transaction between an insolvent grain warehouseman and the state department of agriculture, whereby the former did no more than assent to the taking over of its property (other than stored grain) by the department, may not in an action for the conversion of such property, be held to show the creation of a trust in the department in favor of holders of unredeemed storage tickets, where the complaint did not disclose an intention on the part of the supposed trustor to create a trust or a designation of the beneficiaries (this section and the following section), and hence the district court did not err in sustaining a demurrer to the complaint seeking to recover on the theory that at the time of its seizure by the sheriff, plaintiff was entitled to the possession of the property. (Associate Jus-

tices *Matthews and Ford* dissenting.) *Department of Agriculture etc. v. DeVore*, 91 M 47, 56, 6 P 2d 125.

Statutes to Be Construed Together

In determining what constitutes a trust and the manner of its creation, secs. 86-101, 86-102, 86-105 and 86-207, must be construed together. *Hodgkiss v. Northland Petroleum Consolidated*, 104 M 328, 340, 57 P 2d 811.

References

Cited or applied as section 2956, Civil Code, in *McDonald v. American Nat. Bank*, 25 M 456, 494, 65 P 896; as section 5370, Revised Codes, in *Mantle v. White*, 47 M 234, 241, 132 P 22; *Crosby v. Robbins*, 56 M 179, 190, 182 P 122; *Conley et al. v. Johnson et al.*, 101 M 376, 383, 54 P 2d 585.

Trusts—1 et seq.

65 C.J. Trusts § 21 et seq.

54 Am. Jur. 33, Trusts, §§ 15-92.

86-208. (7885) How created as to trustee. Subject to the provisions of section 86-102, a voluntary trust is created, as to the trustee, by any words or acts of his indicating, with reasonable certainty:

1. His acceptance of the trust, or his acknowledgment, made upon sufficient consideration, of its existence; and,

2. The subject, purpose, and beneficiary of the trust.

History: En. Sec. 2957, Civ. C. 1895; re-en. Sec. 5371, Rev. C. 1907; re-en. Sec. 7885, R. C. M. 1921. Cal. Civ. C. Sec. 2222. Field Civ. C. Sec. 1174.

Operation and Effect

In order to bring about a trust relationship so as to bind the trustee thereby there must have been some act or declaration by the trustee indicating an acceptance of the trust. *Wood v. Robbins et al.*, 67 M 409, 412, 215 P 1101.

The transportation between an insolvent grain warehouseman and the state department of agriculture, whereby the former did no more than assent to the taking over of its property (other than stored grain) by the department, may not in an action for the conversion of such property, be held to show the creation of a trust in the department in favor of holders of unredeemed storage tickets, where the com-

plaint did not disclose an intention on the part of the supposed trustor to create a trust or a designation of the beneficiaries (this and the preceding sections), and hence the district court did not err in sustaining a demurrer to the complaint seeking to recover on the theory that at the time of its seizure by the sheriff, plaintiff was entitled to the possession of the property. (*Associate Justices Matthews and Ford dissenting.*) *Department of Agriculture etc. v. DeVore*, 91 M 47, 56, 6 P 2d 125.

References

Cited or applied as section 5371, Revised Codes, in *Mantle v. White*, 47 M 234, 241, 132 P 22; *Glendenning v. Slayton*, 55 M 586, 594, 179 P 817; *Crosby v. Robbins*, 56 M 179, 190, 182 P 122; *Stagg v. Stagg*, 90 M 180, 189, 300 P 539.

86-209. (7886) Involuntary trustee, who is. One who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner.

History: En. Sec. 2958, Civ. C. 1895; re-en. Sec. 5372, Rev. C. 1907; re-en. Sec. 7886, R. C. M. 1921. Cal. Civ. C. Sec. 2223. Field Civ. C. Sec. 1175.

Operation and Effect

The basis of a constructive trust is fraud, actual or constructive; hence where the act of a tenant of mortgaged land in refusing to deliver possession thereof to the mortgagee on demand based on a provision in the mortgage entitling him to possession on failure of the mortgagor to pay one of the mortgage notes, resulting in ouster proceedings, did not fall within the statutory definition of either actual or constructive fraud, the contention of the mortgagee that the tenant by his wrongful act in withholding possession became a constructive trustee and that his possession after demand was the possession of the mortgagee cannot be sustained. *Morton v. Union Central Life Ins. Co.*, 80 M 593, 611, 261 P 278.

Where the receiver of a corporation sold certain of its property, and thereafter the order appointing the receiver and authorizing a sale was reversed on appeal, the purchasers held the property and the proceeds of their sale thereof as involuntary

trustees for the corporation, and the receiver held the purchase price as an involuntary trustee for the purchasers. *Lutley v. Clark*, 31 M 45, 54, 77 P 305, 84 P 73.

Wrongful Occupation of Land Does Not Create Trust

Held, that this section and the following, general in their nature, declaring who are involuntary trustees of things wrongfully detained from their owner or gained through fraud, etc., for the benefit of the person entitled thereto, have no application to a wrongful occupation of land after demand by its owner, but that as to such occupation the provisions of section 17-402, are controlling. *Kester v. Amon et al.*, 81 M 1, 13, 14, 261 P 288.

References

Kerrigan v. O'Meara, 71 M 1, 5, 227 P 819; *Montana-Wyoming Assn. v. Commercial Bk.*, 80 M 174, 179, 259 P 1060; *Whorley v. Patton-Kjose Company, Inc.*, 90 M 461, 488, 5 P 2d 210.

Trusts \Rightarrow 95, 104, 105.

65 C.J. Trusts §§ 220, 231, 232.

54 Am. Jur. 146, Trusts, §§ 186 et seq.

86-210. (7887) Involuntary trust resulting from fraud, etc. One who gains a thing by fraud, accident, mistake, undue influence, the violation of

a trust, or other wrongful act, is, unless he has some other or better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it.

History: En. Sec. 2959, Civ. C. 1895; re-en. Sec. 5373, Rev. C. 1907; re-en. Sec. 7887, R. C. M. 1921. Cal. Civ. C. Sec. 2224. Field Civ. C. Sec. 1176.

Burden of Proof to Establish Trust

The rule that to establish a trust the evidence must be clear, convincing and practically free from doubt, a question determinable by the trial court, is especially applicable where plaintiff must establish his case largely by his own testimony as to conversations had between himself and a decedent (here his divorced wife) after the lapse of many years, or where parol evidence alone is relied upon. The burden of proving, by clear and convincing evidence, that a deed absolute on its face was intended as a mortgage is upon him who alleges the fact. *Lewis v. Bowman*, 113 M 68, 77, 121 P 2d 162.

Director of Corporation Occupies Fiduciary Relation

In an action to compel conveyance of property allegedly held in trust for plaintiff corporation by a director who had located several mining claims adjacent to the property of the company and needed for dumping waste rock, held, that even though he claimed to be a "dummy" director, a figurehead who discharges no duties, he still owed it the duty not to act against its interests without prior warning for it to protect itself, and though he is not strictly a trustee, he occupies a fiduciary relation to the company, and cannot enrich himself at the expense of the stockholders. *Golden Rod Mining Co. v. Bukvich*, 108 M 569, 575, 92 P 2d 316.

Intention Immaterial

The constructive trust declared by this section is based upon the fundamental idea of fraud or wrongdoing in the trustee, independently of any actual or presumed intention to create a trust, while in all species of resulting trusts, intention is an essential element. *Meagher v. Harrington*, 78 M 457, 470, 254 P 432.

Only Beneficiaries of Fiduciary Relationship May Object to Transaction

Where a director of a corporate holder of an option to purchase mining property for \$32,857.71 purchased the property for \$12,000, subject to the option, through another corporation which he controlled, the corporate holder, its stockholders, and creditors, could prevent him from making a profit and compel him to convey his

rights to the corporate holder, but a third person purchasing the property from one who as a stockholder of the corporate holder redeemed it after a sale on execution is not one of the beneficiaries and had no standing or cause of action to question the director's purchase. *Northern Mining Corporation v. Cooke Mining Co.*, 123 F 2d 9, 12.

Operation and Effect

Where a married woman, owning separate property, was desirous, during a dangerous illness, of conveying to her daughter, but consented to convey to her husband instead, on his promise to devise both this property and his own to the daughter and a son, the husband, on the death of the wife and the repudiation of his promise, occupies the position of an involuntary trustee for the benefit of the daughter, and the latter is the real party in interest on whom devolves the privilege of maintaining the appropriate action. *Huffine v. Lincoln*, 52 M 585, 594, 160 P 820.

The basis of a constructive trust is fraud, actual or constructive; hence where the act of a tenant of mortgaged land in refusing to deliver possession thereof to the mortgagee on demand based on a provision in the mortgage entitling him to possession on failure of the mortgagor to pay one of the mortgage notes, resulting in ouster proceedings, did not fall within the statutory definition of either actual or constructive fraud, the contention of the mortgagee that the tenant by his wrongful act in withholding possession became a constructive trustee and that his possession after demand was the possession of the mortgagee cannot be sustained. *Morton v. Union Central Life Ins. Co.*, 80 M 593, 611, 261 P 278.

Held, that the preceding section and this, general in their nature, declaring who are involuntary trustees of things wrongfully detained from their owner or gained through fraud, etc., for the benefit of the person entitled thereto, have no application to a wrongful occupation of land after demand by its owner, but that as to such occupation the provisions of section 17-402, are controlling. *Kester v. Amon et al.*, 81 M 1, 13, 14, 261 P 288.

References

Cited or applied as section 2959, Civil Code, in *Lutey v. Clark*, 31 M 45, 54, 77 P 305, 84 P 73; *Harrison v. Riddell et al.*, 64 M 466, 478, 210 P 460; *Duffy et al. v. Hastings et al.*, 78 M 22, 34, 252 P 316;

Montana-Wyoming Assn. v. Commercial Bk., 80 M 174, 179, 259 P 1060; Morton v. Union Central Life Ins. Co., 80 M 593, 261 P 278; Whorley v. Patton-Kjose Company, Inc., 90 M 461, 486, 5 P 2d 210; Gunther v. Home Ins. Co. et al., 286 F. 396.

Trusts 93-105.

65 C.J. Trusts §§ 220, 224, 226 et seq., 227, 231, 232.

54 Am. Jur. 167, Trusts, §§ 218 et seq.

CHAPTER 3

TRUSTEE'S OBLIGATIONS—SALE, MORTGAGE OR LEASE OF TRUST PROPERTY

- Section 86-301. Trustee's obligation to good faith.
 86-302. Trustee not to use property for his own benefit.
 86-303. Certain transactions forbidden.
 86-304. Trustee's influence not to be used for his advantage.
 86-305. Trustee not to assume a trust adverse to interest of beneficiary.
 86-306. To disclose adverse interest.
 86-307. Trustee guilty of fraud, when.
 86-308. Presumption against trustees.
 86-309. Trustee mingling trust property with his own.
 86-310. Measure of liability for breach of trust.
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 86-312. Cotrustees—how far liable for each other.
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 86-318. Petition and hearing.
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 86-320. Notice of hearing—service and publication.
 86-321. Unknown defendants.
 86-322. Defendant minors and persons of unsound mind—guardian ad litem.
 86-323. Order—confirmation—conveyances—proceeds.
 86-324. Effect of final order on unknown persons.
 86-325. Validity of final orders.
 86-326. Responsibility for application of money.

86-301. (7888) Trustee's obligation to good faith. In all matters connected with his trust, a trustee is bound to act in the highest good faith toward his beneficiary, and may not obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind.

History: En. Sec. 2970, Civ. C. 1895; re-en. Sec. 5374, Rev. C. 1907; re-en. Sec. 7888, R. C. M. 1921. Cal. Civ. C. Sec. 2228. Field Civ. C. Sec. 1177.

Cross-References

Assessment of trust property for taxation, sec. 84-418.

Trustees of express trusts may prosecute actions, sec. 93-2801.

Writing required to transfer interest in trust, sec. 67-1701.

Officer of Bank Dealing with It

While an officer or director of a bank stands in a fiduciary relation to it and will not be permitted to profit because of his position as such, he may engage in ordinary business transactions with it or through it, provided his dealings are fair

and he takes no undue advantage of his fiduciary relationship. *Duffy et al. v. Hastings et al.*, 78 M 22, 252 P 316.

Operation and Effect

A resolution of four directors of a corporation voting three of their number salaries, and giving them back pay, predicated on by-laws previously passed by five directors, including the first mentioned four, is void under this and succeeding sections. *McConnell v. Combination M. & M. Co.*, 30 M 239, 257, 76 P 194.

A bank which accepts a deposit of money in trust for the benefit of another, to be delivered to a third party upon the happening of a contingency, is bound to the highest good faith in executing the trust thus created; disposition of the deposit contrary to instruction renders the bank

liable in damages either for a conversion, or in assumpsit for money had and received. *Glendenning v. Slayton*, 55 M 586, 594, 179 P 817.

By this section and 86-307, it is made the duty of a trustee to act in the utmost good faith to those for whom he acts, and failure of the manager of a syndicate to inform those to whom sales of units were made through the use of the mails, that by contracts made by him approximately 50 per cent of the proceeds of sales was paid as commissions and expenses to sales agents, was a breach of trust and a fraud upon them. *Campbell v. United States*, 12 F 2d 873.

Purchase of Property by Fiduciary

The directors of a mining corporation are not allowed to profit by virtue of their position, and a breach of official duty on their part is fraud in law. A director, who purchases the property of the corporation at a judicial sale, must not be permitted to obtain a dishonest advantage

over the corporation or its stockholders. *Coombs v. Barker*, 31 M 526, 545, 79 P 1.

Sale by Broker to Himself Voidable

A real estate broker intrusted with the privilege of selling the land of his principal, cannot sell to himself, and where he does so, the sale made by him is voidable at the option of the owner. *Crowley et al. v. Rorvig*, 61 M 245, 262, 203 P 496.

References

Cited or applied as section 5374, Revised Codes, in *Tatem v. Eglanol Mining Co.*, 42 M 475, 489, 113 P 295; *Mayger v. St. Louis Min. etc. Co.*, 68 M 492, 501, 219 P 1102; *State v. Banking Corp. of Montana*, 77 M 134, 150, 251 P 151; In re *Mullen's Estate*, 97 M 144, 159, 33 P 2d 270; *Rasmusson v. Eddy's Steam Bakery*, 57 F 2d 27; *Stephenson v. Rainbow Flying Service, Inc.*, 99 M 241, 42 P 2d 735.

Trusts ⇨ 179.

65 C.J. Trusts § 519.

54 Am. Jur. 246, Trusts, §§ 311-320.

86-302. (7889) Trustee not to use property for his own benefit. A trustee may not use or deal with the trust property for his own benefit, or for any other purpose unconnected with the trust, in any manner.

History: En. Sec. 2971, Civ. C. 1895; re-en. Sec. 5375, Rev. C. 1907; re-en. Sec. 7889, R. C. M. 1921. Cal. Civ. C. Sec. 2229. Field Civ. C. Sec. 1178.

Cross-Reference

Appropriation of property by trustee, larceny, sec. 94-2715.

Operation and Effect

The supreme court has emphasized this statutory rule by declaring that the trustee must account for all accumulations from the use of trust funds, and that under no circumstances will he be permitted to profit from their use. In re *Davis' Estate*, 35 M 273, 286, 88 P 957; *City of Butte v. Goodwin*, 47 M 155, 163, 134 P 670; In re *Allard Guardianship*, 49 M 219, 224, 141 P 661.

It has been a recognized rule in equity for a century or more, that a trustee shall not deal with the trust funds for any purpose not connected with the trust, and shall not profit by malversation of the trust fund. In re *Allard Guardianship*, 49 M 219, 229, 141 P 661.

Good faith requires an agent employed to sell land to account to his principal for the entire selling price, less the agreed commission. *Middlefork Cattle Co. v. Todd*, 49 M 259, 262, 141 P 641.

Where an attorney indorsed a check belonging to his client, deposited it in bank and used the proceeds in the discharge of

his private obligations, repaying it only after being called to account by the client some four months later, he was guilty of a fraud upon the latter, under this section. In re *Lunke*, 56 M 226, 182 P 126.

Generally, an administrator is not permitted to engage the assets of the estate under his control in trade or business; where he does so without authority of court beyond the time required in winding up its affairs and makes a profit it inures to the estate, and if he meets with loss he must bear it. In re *Jennings' Estate*, 74 M 449, 462, 241 P 648.

Where a bank while acting as trustee of an estate had purchased bonds with its own funds and after holding them for about a month transferred them to the estate, retaining accrued interest for that month, the estate receiving the interest from the date the bonds were charged to it, claim of the cestui que trust that the bank profited from the use of estate funds, contrary to the provisions of this section, held of no merit. In re *Harper's Estate*, 98 M 356, 372, 40 P 2d 51.

References

Cited or applied as section 5375, Revised Codes, in *Glendenning v. Slayton*, 55 M 586, 594, 179 P 817; *Crowley et al. v. Rorvig*, 61 M 245, 262, 203 P 496; In re *Eakins' Estate*, 64 M 84, 93, 208 P 956; *Mayger v. St. Louis Min. etc. Co.*, 68 M 492, 501, 219 P 1102; *Duffy et al. v. Hast-*

ings et al., 78 M 22, 252 P 316; Rasmusson v. Eddy's Steam Bakery, 57 F. 2d 27; Stephenson v. Rainbow Flying Service, Inc., 99 M 241, 42 P 2d 735; Conley et al.

v. Johnson et al., 101 M 376, 397, 54 P 2d 585.

Trusts § 171 et seq., 231.
65 C.J. Trusts § 520 et seq.

86-303. (7890) Certain transactions forbidden. Neither a trustee nor any of his agents may take part in any transaction concerning the trust in which he or any one for whom he acts as agent has an interest, present or contingent, adverse to that of his beneficiary, except as follows:

1. When the beneficiary, having capacity to contract, with full knowledge of the motives of the trustee, and of all other facts concerning the transaction which might affect his own decision, and without the use of any influence on the part of the trustee, permits him to do so;

2. When the beneficiary, not having capacity to contract, the proper court, upon the like information of the facts, grants the like permission; or,

3. When some of the beneficiaries, having capacity to contract, and some not having it, the former grant permission for themselves, and the proper court for the latter, in the manner above prescribed.

History: En. Sec. 2972, Civ. C. 1895; re-en. Sec. 5376, Rev. C. 1907; re-en. Sec. 7890, R. C. M. 1921. Cal. Civ. C. Sec. 2230. Based on Field Civ. C. Sec. 1179.

Operation and Effect

A guardian is a trustee, and is held to the strict accountability attaching to a trustee. *Smith v. Smith*, 210 F. 947, 951.

Where a guardian, who had used his ward's money in payment of his debts, concealed this fact from the court in applying for authority to borrow his ward's money at a low rate of interest, the order so procured by fraud and imposition was voidable, and afforded no protection to the guardian, and he was liable for legal interest both before and after the order granting such authority, there having been no such disclosure as is required by this section. *Smith v. Smith*, 210 Fed. 947, 951.

A trustee of a business trust cannot vote as such upon the approval of a claim of his own against the trust; hence where only two of the three trustees constituting the board were present at one of its meetings when the individual claim of one of the two was presented for allowance and

an alleged account stated agreed upon, the action was void for want of competent representation of the trust. *Petroleum Co. v. G. Campbell-Kevin Synd.*, 75 M 261, 270, 242 P 540.

Since a trustee cannot take part in any transaction concerning the trust in which he is interested (this section), a contract entered into between a common-law trust at a meeting of its board of trustees attended by only two of its three members, and a company of which one of the two was the virtual owner, was a nullity, and the fact that the third member in writing subsequently gave his approval did not render it valid for the reason that under section 86-107, the board could act only as a board when assembled as such and not through the individuals composing it. *Williard et al. v. Campbell Oil Co. et al.*, 77 M 30, 39, 248 P 219.

References

Cited or applied as section 5376, Revised Codes, in *Smith v. Smith*, 224 Fed. 1, 10; *Crowley et al. v. Rorvig*, 61 M 245, 262, 203 P 496; *Rasmusson v. Eddy's Steam Bakery*, 57 F. 2d 27.

86-304. (7891) Trustee's influence not to be used for his advantage. A trustee may not use the influence which his position gives to him to obtain any advantage from his beneficiary.

History: En. Sec. 2973, Civ. C. 1895; re-en. Sec. 5377, Rev. C. 1907; re-en. Sec. 7891, R. C. M. 1921. Cal. Civ. C. Sec. 2231. Field Civ. C. Sec. 1180.

References

Roecher v. Story, 91 M 28, 44, 5 P 2d 205.

86-305. (7892) Trustee not to assume a trust adverse to interest of beneficiary. No trustee, so long as he remains in the trust, may undertake another trust adverse in its nature to the interest of his beneficiary in the subject of the trust, without the consent of the latter.

History: En. Sec. 2974, Civ. C. 1895; re-en. Sec. 5378, Rev. C. 1907; re-en. Sec. 7892, R. C. M. 1921. Cal. Civ. C. Sec. 2232. Field Civ. C. Sec. 1181.

Operation and Effect

Held that the rule declared by this section that a trustee may not undertake a trust adverse in its nature to the interest of his beneficiary without the consent of the latter, does not preclude a director of a corporation from becoming interested in

another concern engaged in a business similar to, but not interfering with, that of his corporation; so long as he acts in good faith to the corporation and its shareholders, and violates no legal or moral duty which he owes to it and them, he is free to engage in an independent competitive business. Greer et al. v. Standard et al., 85 M 78, 90, 277 P 622.

Trusts 171 et seq.

65 C.J. Trusts § 518 et seq.

86-306. (7893) To disclose adverse interest. If a trustee acquires any interest, or becomes charged with any duty, adverse to the interest of his beneficiary in the subject of the trust, he must immediately inform the latter thereof, and may be at once removed.

History: En. Sec. 2975, Civ. C. 1895; re-en. Sec. 5379, Rev. C. 1907; re-en. Sec. 7893, R. C. M. 1921. Cal. Civ. C. Sec. 2233. Field Civ. C. Sec. 1182.

References

Cited or applied as section 5379, Revised Codes, in Tatem v. Eglanol Mining Co., 42 M 475, 489, 113 P 295.

86-307. (7894) Trustee guilty of fraud, when. Every violation of the provisions of the preceding sections of this chapter is a fraud against the beneficiary of the trust.

History: En. Sec. 2976, Civ. C. 1895; re-en. Sec. 5380, Rev. C. 1907; re-en. Sec. 7894, R. C. M. 1921. Cal. Civ. C. Sec. 2234. Field Civ. C. Sec. 1183.

Operation and Effect

It is a fraud for a guardian to use the wards' funds, entrusted to him, for any purpose not connected with the trust. In re Allard Guardianship, 49 M 219, 228, 141 P 661.

Good faith requires an agent employed to sell land to account to his principal for the entire selling price, less the agreed commission. Middlefork Cattle Co. v. Todd, 49 M 259, 262, 141 P 641.

Id. If a broker is employed to sell land at a certain price, on commission, and he finds a purchaser at that price, but induces his principal to sell at a lower figure, upon the representation that he cannot get any more, and the broker pockets the difference, it is a clear case of fraud upon his principal, and an action lies to compel

him to disgorge the amount of profit so wrongfully realized.

By section 86-301 and this section, it is made the duty of a trustee to act in the utmost good faith to those for whom he acts, and failure of the manager of a syndicate to inform those to whom sales of units were made through the use of the mails, that by contracts made by him approximately 50 per cent of the proceeds of sale was paid as commissions and expenses to sales agents, was a breach of trust and a fraud upon them. Campbell v. United States, 12 F. 2d 873.

References

Cited or applied as section 2976, Civil Code, in McConnell v. Combination M. & M. Co., 30 M 239, 264, 76 P 194; as section 5380, Revised Codes, in Tatem v. Eglanol Mining Co., 42 M 475, 489, 113 P 295; In re Lunke, 56 M 226, 182 P 126.

Trusts 179.

65 C.J. Trusts § 519.

86-308. (7895) Presumption against trustees. All transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence.

History: En. Sec. 2977, Civ. C. 1895; re-en. Sec. 5381, Rev. C. 1907; re-en. Sec. 7895, R. C. M. 1921. Cal. Civ. C. Sec. 2235. Field Civ. C. Sec. 1184.

Operation and Effect

There is no presumption that a director dealing with his corporation does so in bad faith unless he gains an advantage there-

by, and if the company is indebted to him on a bona fide claim he may enforce it by the same method open to any other of its creditors. *Maygar v. St. Louis Min. etc. Co.*, 68 M 492, 502, 219 P 1102.

Under this section, where two of three trustees of a common law trust were officers of an oil company to which the trustees granted an extension of a drilling lease on lands owned by the trusts under circumstances showing lack of good faith, and whose interests were adverse to those of the trust, it will be presumed that the agreement was entered into without consideration and through undue influence. *Williard et al. v. Campbell Oil Co. et al.*, 77 M 30, 44, 248 P 219.

This section by its express terms applies

86-309. (7896) Trustee mingling trust property with his own. A trustee who wilfully and unnecessarily mingles the trust property with his own, so as to constitute himself in appearance its absolute owner, is liable for its safety in all events.

History: En. Sec. 2978, Civ. C. 1895; re-en. Sec. 5382, Rev. C. 1907; re-en. Sec. 7896, R. C. M. 1921. Cal. Civ. C. Sec. 2236. Field Civ. C. Sec. 1185.

86-310. (7897) Measure of liability for breach of trust. A trustee who uses or disposes of the trust property contrary to section 86-302 may, at the option of the beneficiary, be required to account for all profits so made, or to pay the value of its use, and, if he has disposed thereof, to replace it, with its fruits, or to account for its proceeds, with interest.

History: En. Sec. 2979, Civ. C. 1895; re-en. Sec. 5383, Rev. C. 1907; re-en. Sec. 7897, R. C. M. 1921. Cal. Civ. C. Sec. 2237. Field Civ. C. Sec. 1186.

Not Limiting Cestui Que Trust's Remedies at Law

While this section would seem to provide only equitable remedies against the trustee in his fiduciary capacity, it does not limit the cestui que trust's remedies at law, as evidenced by the following section. *Word v. Union Bank & Trust Co.*, 111 M 279, 286, 107 P 2d 1083.

Operation and Effect

Generally, an administrator is not permitted to engage the assets of the estate

86-311. (7898) Same—for losses only, when. A trustee who uses or disposes of the trust property in any manner not authorized by the trust, but in good faith, and with intent to serve the interests of the beneficiary, is liable only to make good whatever is lost to the beneficiary by his error.

History: En. Sec. 2980, Civ. C. 1895; re-en. Sec. 5384, Rev. C. 1907; re-en. Sec. 7898, R. C. M. 1921. Cal. Civ. C. Sec. 2238. Field Civ. C. Sec. 1187.

after the relation of trustee and beneficiary has been created, as distinguished from the operation of sec. 13-510, in a case where the transactions under consideration were those whereby the relation of trustee and beneficiary was created. *Hodgkiss v. Northland Petroleum Consolidated*, 104 M 328, 334, 57 P 2d 811.

References

Cited or applied as section 5381, Revised Codes, in *Crosby v. Robbins*, 56 M 179, 189, 182 P 122; *Roecher v. Story*, 91 M 28, 45, 5 P 2d 205.

Trusts—262.

65 C.J. Trusts § 771.

Trusts—182, 233, 352.

65 C.J. Trusts §§ 262, 558, 899.

under his control in trade or business; where he does so without authority of court beyond the time required in winding up its affairs and makes a profit it inures to the estate, and if he meets with loss he must bear it. In *re Jennings' Estate*, 74 M 449, 462, 241 P 648.

References

Cited or applied as section 2979, Civil Code, in *Demars v. Hudon*, 33 M 170, 175, 82 P 952; In *re Rodgers' Estate*, 68 M 46, 53, 217 P 678; In *re Eakins' Estate*, 64 M 84, 93, 208 P 956.

Trusts—233, 265.

65 C.J. Trusts §§ 562, 774.

54 Am. Jur. 237, Trusts, § 300.

References

Word v. Union Bank & Trust Co., 111 M 279, 286, 107 P 2d 1083.

Trusts—265.

65 C.J. Trusts § 774.

86-312. (7899) Cotrustees—how far liable for each other. A trustee is responsible for the wrongful acts of a cotrustee to which he consented, or which, by his negligence, he enabled the latter to commit, but for no others.

History: En. Sec. 2981, Civ. C. 1895; Code, in *Coombs v. Barker*, 31 M 526, 545, re-en. Sec. 5385, Rev. C. 1907; re-en. Sec. 79 P 1.
7899, R. C. M. 1921. Cal. Civ. C. Sec. 2239.
Field Civ. C. Sec. 1188.

References

Cited or applied as section 2981, Civil Trusts—240.
65 C.J. Trusts § 533.
54 Am. Jur. 239, Trusts, § 302.

86-313. (7900) Third person—when involuntary trustee. Every one to whom property is transferred in violation of a trust holds the same as an involuntary trustee under such trust, unless he purchased it in good faith, and for a valuable consideration.

History: En. Sec. 2990, Civ. C. 1895; re-en. Sec. 5386, Rev. C. 1907; re-en. Sec. 7900, R. C. M. 1921. Cal. Civ. C. Sec. 2243.
Field Civ. C. Sec. 1189.

Operation and Effect

Where a deposit of trust funds is unlawfully made with the active participation of the bank, it becomes an involuntary trustee under the trust and may be compelled to place the trust estate in statu quo. *Pethybridge v. First State Bk. of Livingston*, 75 M 173, 182, 243 P 569.

The money pledged under these circumstances constituted a trust fund, and it having been mingled with the funds of the estate, without any attempt at segregation, the entire funds of the estate were impressed with the trust in favor of the tenant, and the residuary legatees and devisees having received the trust fund on distribution were liable to him for the money pledged, as involuntary trustees. *Ryan v. Stagg et al.*, 89 M 390, 394, 298 P 353.

One who takes personal property from a trustee by way of a gift made in violation of the latter's trust, becomes an involuntary trustee thereof (this section), stands in the shoes of the trustee and can-

not assert the bar of the statute of limitations unless he repudiates the trust and knowledge of such repudiation is gained by the cestui que trust. *Davidson v. Stagg*, 94 M 272, 278, 22 P 2d 152.

While a bankrupt, during the pendency of bankrupt proceedings against him, may settle a suit brought by him, he holds any proceeds so received as trustee for his creditors, and, if the settlement is made with the present intent to misapply the proceeds, for any such misapplication the parties making payment must make reparation, if at the time of the settlement they had reasonable grounds for believing that bankrupt intended such a conversion, in view of section 86-210, this section and section 86-314. *Gunther v. Home Ins. Co. et al.*, 286 F. 396.

References

Cited or applied as section 5386, Revised Codes, in *Horsky v. McKennan*, 53 M 50, 57, 162 P 376.

Trusts—355-357.

65 C.J. Trusts § 910 et seq.
54 Am. Jur. 241, Trusts, § 305.

86-314. (7901) When third person must see to application of trust property. One who actually and in good faith transfers any money or other property to a trustee, as such, is not bound to see to the application thereof, and his rights can in no way be prejudiced by a misapplication thereof by the trustee. Other persons must, at their peril, see to the proper application of money or other property paid or delivered by them.

History: En. Sec. 2991, Civ. C. 1895; re-en. Sec. 5387, Rev. C. 1907; re-en. Sec. 7901, R. C. M. 1921. Cal. Civ. C. Sec. 2244.
Field Civ. C. Sec. 1190.

Operation and Effect

While a bankrupt, during the pendency of bankrupt proceedings against him, may settle a suit brought by him, he holds any

proceeds so received as trustee for his creditors, and, if the settlement is made with the present intent to misapply the proceeds for any such misapplication the parties making payment must make reparation, if at the time of the settlement they had reasonable grounds for believing that bankrupt intended such a conversion, in view of sections 86-210, 86-313 and this

section. *Gunther v. Home Ins. Co., et al.*,
286 F. 396.

Trusts \hookrightarrow 215.

65 C.J. Trusts § 653.

54 Am. Jur. 241, Trusts, § 305.

86-315. Power of district court concerning trust property. When any trust is expressed in the instrument creating the trust estate, every sale, conveyance or other act of the trustee in contravention of the instrument creating the trust shall be absolutely void, except as in this act provided. The district court of the county wherein the property, whether real or personal, or any part thereof, held in trust is situate may by order, on such terms and conditions as seem just and proper, authorize and direct any trustee, whether it be a trust created by writing or otherwise, to sell or otherwise dispose of, or lease the property, for the development of its mineral resources, or mortgage all or any part of such trust property, whether real or personal, whenever it appears to the satisfaction of the court that it is necessary, advisable, or for the benefit, or for the best interest of the trust estate, or of the person or persons beneficially interested therein holding the first and present estate, interest or use, and that it will do no substantial injury to the heirs or next of kin, or others in succession, expectancy, reversion or remainder, or the beneficiaries, in respect of such property.

History: En. Sec. 1, Ch. 265, L. 1947.

86-316. Lease of property. The district court may, by order, on such terms and conditions as seem to it just and proper, authorize such trustee to lease such property for a term exceeding five (5) years, if it appears to the satisfaction of the court that it is for the best interest of the trust estate, or the beneficiaries thereof, and may authorize such trustee to covenant in the least to pay, at the end of the term or any renewal term, to the lessee, the then fair and reasonable value of any buildings and improvements which may have been erected or placed on the leased premises during such term or renewal term.

History: En. Sec. 2, Ch. 265, L. 1947.

86-317. Mineral lease. The district court may, by order, on such terms and conditions as may be just and proper, authorize such trustee to lease such property for the purpose of developing the mineral resources of the same for a term of years under the usual terms and conditions and under such terms and conditions as to the court may seem just and equitable.

History: En. Sec. 3, Ch. 265, L. 1947.

86-318. Petition and hearing. Application to the court for an order to sell or otherwise dispose of, or mortgage such trust property, real or personal, or any part thereof, or to lease such trust property, real or personal, or any part thereof, shall be by duly verified petition made by such trustee, or any person beneficially interested in such property. Such petition shall set forth the nature of the trust estate, the particular facts making it necessary or proper for the application to be granted, a description of the trust property to be sold or otherwise disposed of, or mortgaged, or leased, and the interest of the petitioner therein, and if said order is petitioned for on the ground that it is for the advantage, best interest and benefit of the trust estate, and those interested therein, including minor heirs, if any, that the order be made, the petition, in addition to the foregoing facts, must set

forth in what way an advantage or benefit would accrue to the trust estate, or to those interested therein, by the granting of such an order prayed for. Such petition and the notice of hearing thereof shall set forth, so far as appears of record or as known to the petitioner, the names of the beneficiaries and those interested in said trust, and in addition such petition shall set out the places of residence of all persons, who have any right, title, interest, estate or lien, and the nature thereof, in or upon the trust property, or who, by the terms of the instrument creating the trust, are known to the petitioner to have an interest in said trust property. If there be persons having, or claiming to have, or who, at any time thereafter, may have any interest in the trust property, whose names are unknown, it shall be lawful to include such persons in such petition and the notice of hearing thereof, by the name and description of unknown persons interested in the trust property, and, to that end, such petition and notice, in addition to setting out the names of the persons aforesaid, may contain the following: "And any and all persons known or unknown, claiming or who might claim, any right, title, estate or interest in or to, or any lien or encumbrance upon the real estate in the petition described, or any part thereof, whether such claim or possible claim be present or contingent, including any claim or possible claim of dower, inchoate or accrued". Such petition, together with a copy, annexed thereto, of the deed, will or other written instrument creating the trust estate, if any, shall be filed in the office of the clerk of the district court of the county wherein such property, or some part thereof, is situate. Upon the filing of any such petition, the district court shall, by order, fix a time and place of hearing the same. Such hearing may be at chambers, or at a general or special term of the court wherein the proceedings are pending.

History: En. Sec. 4, Ch. 265, L. 1947.

86-319. Venue. All actions brought under this act must be brought in the county in which the real estate, or a portion thereof, is situated; provided, that if said real estate is situated in more than one county, said action may be brought or procured in either of said counties and a transcript of the original judgment, certified by the clerk of the court, shall be filed in the office of the clerk of the court in the county other than the one in which said action was brought, in which any part of the real estate affected thereby is situated.

History: En. Sec. 5, Ch. 265, L. 1947.

86-320. Notice of hearing—service and publication. Notice of such hearing stating the time and place thereof and the objects of the petition shall be served upon all persons named in the petition as having any right, title, interest, estate or lien in or upon the trust property, or who, by the terms of the instrument creating such trust, may, at any time thereafter, have any such right, title, interest, estate or lien. When the person on whom the notice of hearing is to be served resides out of the state, or has departed from the state, or cannot, after due diligence, be found within the state, or conceals himself to avoid the service of notice of hearing; or when the defendant is a foreign corporation, having no managing or business agent, cashier, secretary, or other officer within the state, and an affidavit stating any of these facts is filed with the clerk of the court in which the action is

brought, and such affidavit also states that a cause of action exists against the defendant in respect to whom the service of notice of hearing is to be made, and that he or it is a necessary or proper party to the action, the clerk of the court in which the action is commenced shall cause the service of notice of hearing to be made by publication thereof. Such notice shall be served, in the same manner as a summons in a civil action, except that publication thereof shall be made for two (2) consecutive weeks in a regularly published newspaper of general circulation in the county wherein such proceedings are pending, or, if no such newspaper be published in such county, the publication may be made in such newspaper published in an adjoining county. Service of such notice may be had upon all persons named and described in such petition and notice, as unknown persons interested in the trust property, by publication of such notice in the same manner and for the same time, as in the case of non-residents whose names are set out in the petition, upon the filing in said court of an affidavit by the petitioner, his agent or attorney, stating that there are, or that affiant is informed or believes there are, certain persons, in addition to those whose names are set out in such petition, who have, or claim to have, or may have some right, title, interest, estate or lien in or upon the trust property, the nature of which is, as well as the names and places of whom are, to affiant unknown.

History: En. Sec. 6, Ch. 265, L. 1947.

86-321. Unknown defendants. When persons are made defendant by the style and description of unknown heirs, there shall be added to such designation of them the name of the deceased person of whom they shall be claimed or supposed to be the heirs. When persons are made defendant by the style and description of unknown devisees, there shall be added to such designation the name of the deceased person of whom they shall be claimed or supposed to be devisees.

History: En. Sec. 7, Ch. 265, L. 1947.

86-322. Defendant minors and persons of unsound mind—guardian ad litem. In case any person, whose name is set out in such petition, is a minor or a person of unsound mind, such notice of hearing shall be served upon the duly appointed guardian, or other legal representative of such person, if any. If there be none, then the district court in which such proceedings are pending shall appoint any competent person as a guardian ad litem for such person and may compel the person so appointed to act. In such case, service of such notice of hearing shall be had by service on such guardian ad litem.

History: En. Sec. 8, Ch. 265, L. 1947.

86-323. Order — confirmation — conveyances — proceeds. Upon proof being filed of the service of such notice, the court, at the time and place therein fixed or to which the hearing may be adjourned, shall hear all competent evidence offered for and against the granting of such petition, regulating the order of proof, as it may deem best, and shall make and enter a final order upon the application. If the application is granted, the final order shall authorize the sale or other disposition, or the mortgaging or leasing, as the case may be, of such trust property, or part thereof, in

manner and upon such terms as the court may prescribe. Any such sale or other disposition, mortgaging or leasing of such trust property, by such trustee, shall be reported to the court for confirmation and confirmed by the court, before the same shall become effective and valid. Upon such confirmation, such trustee shall make, execute and deliver, subject to such terms and conditions as the court in its order of confirmation may impose, good and sufficient instruments of conveyance, assignment, and transfer, or mortgage, or lease, as the case may be. On receipt by such trustee of the money, or other proceeds derived from any such sale or other disposition, or mortgaging or leasing of such trust property, such money or other proceeds shall be held, administered, distributed or otherwise dealt with by such trustee under and pursuant to the terms of the deed, will or other written instrument creating a trust; then the court shall, by order and judgment, direct the distribution and administration of such funds or property.

History: En. Sec. 9, Ch. 265, L. 1947.

86-324. Effect of final order on unknown persons. The final order of the court in such proceedings, made or had with respect to such unknown persons, shall have the same effect and be as binding and conclusive upon them, as though they had been named and described in such petition and notice by their proper names; provided, that, all such unknown persons, so served as in this act provided, shall have the same right to appear and object to such order and the granting thereof, after such order has been made and entered, as persons would have, who are named and described by their proper names in such petition and notice, and have been served with such notice by publication, as provided in this act.

History: En. Sec. 10, Ch. 265, L. 1947.

86-325. Validity of final orders. The final order of the court in such proceedings, and every deed or other instrument of conveyance, assignment, transfer, mortgage or lease made, executed and delivered by such trustee, pursuant to any such final order, shall be valid and effectual against all persons whose names are set out in such petition, and all persons therein named and described as unknown persons interested in the trust property, served with notice of hearing as in this act provided, or appearing voluntarily in the proceedings and consenting to the granting of such order, whether such persons, or any of them, are in being or not in being, and whatever the nature of their interest and estate in the trust property, whether vested or contingent, in expectancy, in reversion or in remainder, or otherwise, at the time of the granting of such order.

History: En. Sec. 11, Ch. 265, L. 1947.

86-326. Responsibility for application of money. Any person who shall actually and in good faith pay to any such trustee any money or other proceeds derived from the sale or other disposition, or from the mortgaging or leasing of such trust property, or any part thereof, shall not be responsible for the proper application of such money, or other proceeds, in accordance with the terms of the trust; and any right, title or interest derived from such trustee by such person, in consideration of such payment, shall not be

impeached or called in question in consequence of any misapplication by such trustee of such money or proceeds so paid.

History: En. Sec. 12, Ch. 265, L. 1947.

CHAPTER 4

TRUSTS FOR BENEFIT OF THIRD PERSONS—NATURE AND CREATION

- Section 86-401. Application of provisions.
 86-402. Creation of trust.
 86-403. Trustees appointed by court.
 86-404. Declaration of trust.
 86-405. Same—declarations before acceptance.
 86-406. Recording of deeds of trust—notice.

86-401. (7902) Application of provisions. The provisions of this chapter apply only to express trusts, created for the benefit of another than the trustor, and in which the title to the trust property is vested in the trustee; not including, however, those of executors, administrators, and guardians, as such.

History: En. Sec. 3000, Civ. C. 1895; re-en. Sec. 5388, Rev. C. 1907; re-en. Sec. 7902, R. C. M. 1921. Cal. Civ. C. Sec. 2250. Field Civ. C. Sec. 1191.

References

Petroleum Co. v. G. Campbell-Kevin Synd., 75 M 261, 270, 242 P 540.

Trusts 1 et seq.
 65 C.J. Trusts § 10.

86-402. (7903) Creation of trust. The mutual consent of a trustor and trustee creates a trust of which the beneficiary may take advantage at any time prior to its rescission.

History: En. Sec. 3001, Civ. C. 1895; re-en. Sec. 5389, Rev. C. 1907; re-en. Sec. 7903, R. C. M. 1921. Cal. Civ. C. Sec. 2251. Field Civ. C. Sec. 1192.

before its rescission. Willoburn Ranch Co. v. Yegen, 45 M 254, 259, 122 P 915.

References

Department of Agriculture etc. v. De Vore, 91 M 47, 61, 6 P 2d 125.

Operation and Effect

If a trust is created to secure to the beneficiary an unpaid balance due him, he can take advantage of it at any time

Trusts 1 et seq.
 65 C.J. Trusts § 31 et seq.
 54 Am. Jur. 33, Trusts, § 15 et seq.

86-403. (7904) Trustees appointed by court. When a trustee is appointed by a court or public officer, as such, such court or officer is the trustor, within the meaning of the last section.

History: En. Sec. 3002, Civ. C. 1895; re-en. Sec. 5390, Rev. C. 1907; re-en. Sec. 7904, R. C. M. 1921. Cal. Civ. C. Sec. 2252. Field Civ. C. Sec. 1193.

Trusts 122.
 65 C.J. Trusts § 258.
 54 Am. Jur. 105, Trusts, § 121.

86-404. (7905) Declaration of trust. The nature, extent, and object of a trust are expressed in the declaration of trust.

History: En. Sec. 3003, Civ. C. 1895; re-en. Sec. 5391, Rev. C. 1907; re-en. Sec. 7905, R. C. M. 1921. Cal. Civ. C. Sec. 2253. Field Civ. C. Sec. 1194.

Trusts 112 et seq.
 65 C.J. Trusts § 240 et seq.

86-405. (7906) Same—declarations before acceptance. All declarations of a trustor to his trustees, in relation to the trust, before its acceptance by the trustees, or any of them, are to be deemed part of the declaration of

the trust, except that when a declaration of trust is made in writing, all previous declarations by the same trustor are merged therein.

History: En. Sec. 3004, Civ. C. 1895; 7906, R. C. M. 1921. Cal. Civ. C. Sec. 2254. re-en. Sec. 5392, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 1195.

86-406. (7907) Recording of deeds of trust—notice. Declarations of trust and trust agreements duly executed and acknowledged, and wills creating trusts, may be recorded in the office of the county clerk and recorder of the county in which the principal office of the trustee is located, and when lands are the subject of the trust, may also be recorded in the office of the county clerk and recorder of the county in which the lands are situated, which are the subject of such trust, and when so recorded shall be constructive notice to all persons dealing with the trustees or the trust property, of the powers, duties, obligations, limitations, liabilities, and rights of the trustees, and beneficiaries thereunder, and of all the terms, conditions, and limitations of such declaration of trust, trust agreement, or will.

History: En. Sec. 1, Ch. 218, L. 1921; Trusts 23.
re-en. Sec. 7907, R. C. M. 1921. 65 C.J. Trusts § 45.

Cross-Reference

Notice imparted by recording of trust deed, sec. 73-206.

CHAPTER 5

TRUSTS FOR BENEFIT OF THIRD PERSONS—OBLIGATIONS, POWERS AND RIGHTS OF TRUSTEES

- Section 86-501. Trustees must obey declaration of trust.
86-502. Degree of care and diligence in execution of trust.
86-503. Duty of trustee as to appointment of successor.
86-504. Investment of money by trustee.
86-505. Interest, simple or compound, on omission to invest trust moneys.
86-506. Purchase by trustee of claims against trust fund.
86-507. Trustee's powers as agent.
86-508. All must act.
86-509. Discretionary powers.
86-510. Indemnification of trustee.
86-511. Compensation of trustee.
86-512. Involuntary trustee.

86-501. (7908) Trustees must obey declaration of trust. A trustee must fulfil the purpose of the trust, as declared at its creation, and must follow all the directions of the trustor given at that time, except as modified by the consent of all parties interested, in the same manner and to the same extent as an employee.

History: En. Sec. 3010, Civ. C. 1895; Trusts 171 et seq.
re-en. Sec. 5393, Rev. C. 1907; re-en. Sec. 65 C.J. Trusts § 518 et seq.
7908, R. C. M. 1921. Cal. Civ. C. Sec. 2258. 54 Am. Jur. 242, Trusts, §§ 306-310.
Field Civ. C. Sec. 1196.

86-502. (7909) Degree of care and diligence in execution of trust. A trustee, whether he receives any compensation or not, must use at least ordinary care and diligence in the execution of his trust.

History: En. Sec. 3011, Civ. C. 1895; Trusts 179.
re-en. Sec. 5394, Rev. C. 1907; re-en. Sec. 65 C.J. Trusts § 519.
7909, R. C. M. 1921. Cal. Civ. C. Sec. 2259. 54 Am. Jur. 255, Trusts, §§ 321-329.
Field Civ. C. Sec. 1197.

86-503. (7910) Duty of trustee as to appointment of successor. If a trustee procures or assents to his discharge from his office, before his trust is fully executed, he must use at least ordinary care and diligence to secure the appointment of a trustworthy successor before accepting his own final discharge.

History: En. Sec. 3012, Civ. C. 1895;
re-en. Sec. 5395, Rev. C. 1907; re-en. Sec.
7910, R. C. M. 1921. Cal. Civ. C. Sec. 2260.
Field Civ. C. Sec. 1198.

Trusts⇒162, 169.

65 C.J. Trusts §§ 406, 497 et seq.

54 Am. Jur. 114, Trusts, § 135.

86-504. (7911) Investment of money by trustee. A trustee must invest money received by him under the trust, as fast as he collects a sufficient amount, in such manner as to afford reasonable security and interest for the same.

History: En. Sec. 3013, Civ. C. 1895;
re-en. Sec. 5396, Rev. C. 1907; re-en. Sec.
7911, R. C. M. 1921. Cal. Civ. C. Sec. 2261.
Field Civ. C. Sec. 1199.

Trusts⇒216-218.

65 C.J. Trusts §§ 672 et seq., 688, 701
et seq.

54 Am. Jur. 291, Trusts, §§ 370 et seq.

86-505. (7912) Interest, simple or compound, on omission to invest trust moneys. If a trustee omits to invest the trust moneys according to the last section, he must pay simple interest thereon, if such omission is negligent merely, and compound interest if it is wilful.

History: En. Sec. 3014, Civ. C. 1895;
re-en. Sec. 5397, Rev. C. 1907; re-en. Sec.
7912, R. C. M. 1921. Cal. Civ. C. Sec. 2262.
Field Civ. C. Sec. 1200.

Trusts⇒219.

65 C.J. Trusts § 707 et seq.

86-506. (7913) Purchase by trustee of claims against trust fund. A trustee cannot enforce any claim against the trust property which he purchases after or in contemplation of his appointment as trustee; but he may be allowed, by any competent court, to charge to the trust property what he has in good faith paid for the claim, upon discharging the same.

History: En. Sec. 3015, Civ. C. 1895;
re-en. Sec. 5398, Rev. C. 1907; re-en. Sec.
7913, R. C. M. 1921. Cal. Civ. C. Sec. 2263.
Field Civ. C. Sec. 1201.

Trusts⇒225, 231, 236.

65 C.J. Trusts §§ 520 et seq., 571 et seq.,
591 et seq.

86-507. (7914) Trustee's powers as agent. A trustee is a general agent for the trust property. His authority is such as is conferred upon him by the declaration of trust and by this chapter, and none other. His acts, within the scope of his authority, bind the trust property to the same extent as the acts of an agent bind his principal.

History: En. Sec. 3020, Civ. C. 1895;
re-en. Sec. 5399, Rev. C. 1907; re-en. Sec.
7914, R. C. M. 1921. Cal. Civ. C. Sec. 2267.
Field Civ. C. Sec. 1202.

far as the parties are concerned, are the same as those which would attach to an agent's authorized transactions for his principal. *Tuttle v. Union Bank and Trust Co.*, 112 M 568, 577, 119 P 2d 884.

Operation and Effect

The effect of this section, viewed in connection with sec. 2-212, stating when the agent is responsible to third persons as a principal for his acts in the course of his agency, is either that the trust estate is to be considered an entity chargeable as a principal for the acts of the trustee, its agent, or that the legal incidents of the trustee's authorized acts, so

Suits Against Trustee in Representative Capacity to Enforce Claim Against Trust Property

A testator left residue of estate to bank in trust for support and maintenance of his daughter who became invalid. Plaintiff's assignor furnished the requisite care and medical attention, and upon trustee bank's refusal to pay, brought suit at law

on the theory of its personal liability, as distinguished from its liability as trustee. Held, that the district court properly sustained a general demurrer, the remedy being against the trustee bank in its representative capacity to obtain a judgment enforceable against the trust property. *Tuttle v. Union Bank and Trust Co.*, 112 M 568, 577, 119 P 2d 884.

86-508. (7915) All must act. Where there are several cotrustees, all must unite in any act to bind the trust property, unless the declaration of trust otherwise provides.

History: En. Sec. 3021, Civ. C. 1895; re-en. Sec. 5400, Rev. C. 1907; re-en. Sec. 7915, R. C. M. 1921. Cal. Civ. C. Sec. 2268. Field Civ. C. Sec. 1203.

Operation and Effect

Held, that one of five statutory trustees in charge of the affairs of a dissolved corporation may not prosecute an appeal to the supreme court from an order ap-

References

Petroleum Co. v. G. Campbell-Kevin Synd., 75 M 261, 269, 242 P 540; *Department of Agriculture etc. v. DeVore*, 91 M 47, 61, 6 P 2d 125.

Trusts—171.

65 C.J. Trusts § 518.

54 Am. Jur. 229, Trusts, §§ 288 et seq.

pointing a receiver for the corporation against the wishes of his cotrustees, irrespective of whether unit or majority rule of action controls under certain statutes. *Union Bank etc. Co. v. Penwell et al.*, 99 M 255, 267, 42 P 2d 457.

Trusts—239.

65 C.J. Trusts § 531.

54 Am. Jur. 235, Trusts, § 296.

86-509. (7916) Discretionary powers. A discretionary power conferred upon a trustee is presumed not to be left to his arbitrary discretion, but may be controlled by the proper court if not reasonably exercised, unless an absolute discretion is clearly conferred by the declaration of trust.

History: En. Sec. 3022, Civ. C. 1895; re-en. Sec. 5401, Rev. C. 1907; re-en. Sec. 7916, R. C. M. 1921. Cal. Civ. C. Sec. 2269. Field Civ. C. Sec. 1204.

References

Stagg v. Stagg, 90 M 180, 189, 300 P 539.

Trusts—177.

65 C.J. Trusts § 538.

54 Am. Jur. 234, Trusts, § 294.

86-510. (7917) Indemnification of trustee. A trustee is entitled to the repayment, out of the trust property, of all expenses actually and properly incurred by him in the performance of his trust. He is entitled to the repayment of even unlawful expenditures, if they were productive of actual benefit to the state.

History: En. Sec. 3030, Civ. C. 1895; re-en. Sec. 5402, Rev. C. 1907; re-en. Sec. 7917, R. C. M. 1921. Cal. Civ. C. Sec. 2273. Field Civ. C. Sec. 1205.

Operation and Effect

The rule that an executor is entitled to legal interest on necessary advances made in good faith when beneficial to the es-

tate, applies where he borrows money for the purpose of paying taxes on estate property without previous court order. In *re Kelley's Estate*, 91 M 98, 104, 5 P 2d 559.

Trusts—236.

65 C.J. Trusts § 591 et seq.

54 Am. Jur. 409, Trusts, § 514 et seq.

86-511. (7918) Compensation of trustee. When a declaration of trust is silent upon the subject of compensation, the trustee is entitled to the same compensation as an executor. If it specifies the amount of his compensation, he is entitled to the amount thus specified, and no more. If it directs that he shall be allowed a compensation, but does not specify the rate or amount, he is entitled to such compensation as may be reasonable under the circumstances.

History: En. Sec. 3031, Civ. C. 1895; re-en. Sec. 5403, Rev. C. 1907; re-en. Sec.

7918, R. C. M. 1921. Cal. Civ. C. Sec. 2274. Field Civ. C. Sec. 1206.

Trusts 314-321.
65 C.J. Trusts §§ 805 et seq., 837, 846
et seq.

54 Am. Jur. 416, Trusts, §§ 525 et seq.

86-512. (7919) Involuntary trustee. An involuntary trustee, who becomes such through his own fault, has none of the rights mentioned in the two preceding sections.

History: En. Sec. 3032, Civ. C. 1895; 7919, R. C. M. 1921. Cal. Civ. C. Sec. 2275.
re-en. Sec. 5404, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 1207.

CHAPTER 6

EXTINGUISHMENT, REVOCATION AND VACATION OF TRUSTS —SUCCESSION

Section 86-601. Trust—how extinguished.
86-602. Not revocable.
86-603. Trustee's office—how vacated.
86-604. Trustee—how discharged.
86-605. Removal by district court.
86-606. Vacant trusteeship filled by court.
86-607. Survivorship between cotrustees.
86-608. District court to appoint trustees, when.

86-601. (7920) Trust—how extinguished. A trust is extinguished by the entire fulfilment of its object, or by such object becoming impossible or unlawful.

History: En. Sec. 3040, Civ. C. 1895; Trusts 60, 61.
re-en. Sec. 5405, Rev. C. 1907; re-en. Sec. 65 C.J. Trusts § 128 et seq.
7920, R. C. M. 1921. Cal. Civ. C. Sec. 2279. 54 Am. Jur. 75, Trusts, §§ 70 et seq.
Field Civ. C. Sec. 1208.

86-602. (7921) Not revocable. A trust cannot be revoked by the trustor after its acceptance, actual or presumed, by the trustee and beneficiaries, except by the consent of all the beneficiaries, unless the declaration of trust reserves a power of revocation to the trustor, and in that case the power must be strictly pursued.

History: En. Sec. 3041, Civ. C. 1895; Trusts 59.
re-en. Sec. 5406, Rev. C. 1907; re-en. Sec. 65 C.J. Trusts § 113 et seq.
7921, R. C. M. 1921. Cal. Civ. C. Sec. 2280.
Field Civ. C. Sec. 1209.

86-603. (7922) Trustee's office—how vacated. The office of a trustee is vacated:

1. By his death; or,
2. By his discharge.

History: En. Sec. 3042, Civ. C. 1895; Trusts 162-168.
re-en. Sec. 5407, Rev. C. 1907; re-en. Sec. 65 C.J. Trusts §§ 335, 406, 445.
7922, R. C. M. 1921. Cal. Civ. C. Sec. 2281. 54 Am. Jur. 109, Trusts, §§ 127 et seq.
Field Civ. C. Sec. 1210.

86-604. (7923) Trustee—how discharged. A trustee can be discharged from his trust only as follows:

1. By the extinction of the trust;
2. By the completion of his duties under the trust;
3. By such means as may be prescribed by the declaration of trust;
4. By the consent of the beneficiary, if he had capacity to contract;

5. By the judgment of a competent tribunal, in a direct proceeding for that purpose, that he is of unsound mind; or,

6. By the district court.

History: En. Sec. 3043, Civ. C. 1895; re-en. Sec. 5408, Rev. C. 1907; re-en. Sec. 7923, R. C. M. 1921. Cal. Civ. C. Sec. 2282. Field Civ. C. Sec. 1211.

References

Gilna v. Barker et al., 78 M 357, 365, 254 P 174.

86-605. (7924) Removal by district court. The district court may remove any trustee who has violated or is unfit to execute the trust, or may accept the resignation of a trustee.

History: En. Sec. 3044, Civ. C. 1895; re-en. Sec. 5409, Rev. C. 1907; re-en. Sec. 7924, R. C. M. 1921. Cal. Civ. C. Sec. 2283. Based on Field Civ. C. Sec. 1212.

54 Am. Jur. 111, Trusts, §§ 130-132.

86-606. (7925) Vacant trusteeship filled by court. The district court may appoint a trustee whenever there is a vacancy, and the declaration of trust does not provide a practicable method of appointment.

History: En. Sec. 3050, Civ. C. 1895; re-en. Sec. 5410, Rev. C. 1907; re-en. Sec. 7925, R. C. M. 1921. Cal. Civ. C. Sec. 2287. Based on Field Civ. C. Sec. 1213.

livered a quantity of jewelry to her daughter-in-law with instruction to turn it over to her surviving husband to be in turn delivered to their sons when old enough to appreciate the gift, the result of the transaction was the creation of a voluntary trust, which was not terminated by the death of the father before the trust was executed, the court in such a case having power to appoint a trustee to carry it out. Stagg v. Stagg, 90 M 180, 189, 300 P 539.

Common Law Trust Deadlocked in Business Matters

In an action to quiet title to mining property owned by common law trust of five trustees, the interest of one of whom had allegedly been transferred to cross-complainant who had never received his stock, resulting in a hopeless deadlock of the remaining four in business matters by a vote of two to two and the court appointed a receiver at the request of cross-complainant, held, that the remedies provided by the trust agreement should have been exhausted first, and that under this section the court could appoint a successor to fill the vacancy if the agreement does not provide a method. Remanded for revocation of order appointing receiver. Demos v. Doepker, 116 M 264, 270, 149 P 2d 544.

Vacancy How Filled

Under this section, where a bank designated trustee of a sum of money for a specified purpose, became insolvent and quit business, the district court was required to appoint a successor. Conley et al. v. Johnson et al., 101 M 376, 389, 54 P 2d 585.

Trusts—160, 169.

65 C.J. Trusts § 497 et seq.

54 Am. Jur. 114, Trusts, § 134.

Operation and Effect

Where a mother upon her death-bed de-

86-607. (7926) Survivorship between cotrustees. On the death, renunciation, or discharge of one of several cotrustees, the trust survives to the others.

History: En. Sec. 3051, Civ. C. 1895; re-en. Sec. 5411, Rev. C. 1907; re-en. Sec. 7926, R. C. M. 1921. Cal. Civ. C. Sec. 2288. Field Civ. C. Sec. 1214.

Trusts—168.

65 C.J. Trusts § 492 et seq.

54 Am. Jur. 235, Trusts, § 297.

86-608. (7927) District court to appoint trustees, when. When a trust exists without any appointed trustee, or where all the trustees renounce, die, or are discharged, the district court of the county where the trust property, or some portion thereof, is situated, must appoint another trustee, and direct

the execution of the trust. The court may, in its discretion, appoint the original number, or any less number of trustees.

History: En. Sec. 3052, Civ. C. 1895;
re-en. Sec. 5412, Rev. C. 1907; re-en. Sec.
7927, R. C. M. 1921. Cal. Civ. C. Sec. 2289.
Based on Field Civ. C. Sec. 1215.

Trusts 160, 169.

65 C.J. Trusts § 497 et seq.

54 Am. Jur. 105, Trusts, §§ 121-123.

TITLE 87

UNEMPLOYMENT COMPENSATION

Chapter 1. The unemployment compensation law, 87-101 to 87-152.

CHAPTER 1

THE UNEMPLOYMENT COMPENSATION LAW

- Section 87-101. Act, how cited.
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—violation of act or regulations—wrongfully collecting benefits.
87-146. Representation in court.
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- 87-149. Definitions—continued.
 87-150. Saving clause.
 87-151. Act to be in effect.
 87-152. Approval by social security board.

87-101. Act, how cited. This act shall be known and may be cited as the "Unemployment Compensation Law".

History: En. Sec. 1, Ch. 137, L. 1937.

References

State ex rel. Barr v. District Court, 108 M 433, 436, 91 P 2d 399.

Master and Servant—78.

39 C.J. Master and Servant § 362 et seq.

48 Am. Jur. 511, Social Security, Unemployment Insurance, and Retirement Funds, generally.

Judicial questions regarding Federal Social Security Act and state legislation adopted in anticipation of or after the passage of that act to set up "state plan" contemplated by it. 100 ALR 697.

Who is an independent contractor rather than an employee within Social Security Acts or Unemployment Compensation Acts. 124 ALR 682.

Construction and application of state unemployment compensation act as affected by terms of the Federal act or judicial or administrative rulings thereunder. 139 ALR 892.

Construction and application of self-employment provisions of social security or unemployment compensation acts. 146 ALR 748.

What constitutes "agricultural labor" or "farm labor" within social security or unemployment compensation act. 146 ALR 1318.

87-102. Declaration of state public policy. As a guide to the interpretation and application of this act, the public policy of this state is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. The legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this state require the enactment of this measure under the police powers of the state for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own.

History: En. Sec. 2, Ch. 137, L. 1937.

Statutes—179.

59 C.J. Statutes § 567.

48 Am. Jur. 520, Social Security, Unemployment Insurance, and Retirement Funds, §§ 10 et seq.

87-103. Benefits. (a) Payment of benefits. Thirty (30) months after the date when contributions first accrue under this act from the employer, benefits shall become payable from the fund to any individual, who thereafter is or becomes unemployed and eligible for benefits as is herein prescribed, provided, however, that wages earned for services performed as an employee representative as defined in the railroad unemployment insurance act (52 Stat. 1094), or for services performed for an employer, as defined in said act, shall not be included for the purposes of determining eligibility or weekly benefit amount under this act with respect to any benefit year com-

mencing on or after July 1, 1939, nor shall any benefits with respect to unemployment occurring on and after July 1, 1939, be payable on the basis of such wages under any provisions of this act. All benefits shall be paid through public employment offices in the state of Montana, or other agencies designated by the commission, in accordance with such rules and regulations as the commission may prescribe.

(b) Weekly benefit amount for total unemployment. Each eligible individual, who is totally unemployed (as defined in this act) in any week, shall be paid with respect to such week, benefits at the rate of four and one-half ($4\frac{1}{2}$) per centum of his total wages in employment for employers in the quarter of his base period wherein his earnings were highest, if a multiple of a dollar, or computed to the next highest multiple of a dollar, but not more than eighteen dollars (\$18.00) per week, nor less than seven dollars (\$7.00) per week.

(c) Wage record. The commission shall maintain a record of the wages paid to an individual in accordance with wages earned by him for employment by employers during each quarter.

History: En. Sec. 3(a), (b), (c), Ch. 137, L. 1937; amd. Sec. 1, Ch. 137, L. 1939; amd. Sec. 1, Ch. 164, L. 1941; amd. Sec. 1, Ch. 245, L. 1947.

87-104. Duration of benefits. The maximum total amount of benefits payable to any eligible individual during any benefit year shall not exceed sixteen (16) times his weekly benefit amount.

History: En. Sec. 3(d), Ch. 137, L. 1937; amd. Sec. 1, Ch. 137, L. 1939; amd. Sec. 1, Ch. 164, L. 1941; amd. Sec. 1, Ch. 245, L. 1947.

87-105. Benefit eligibility conditions. An unemployed individual shall be eligible to receive benefits with respect to any week only if the commission finds that—

(a) He has registered for work at and thereafter has continued to report at an employment office in accordance with such regulation as the commission may prescribe, except that the commission may, by regulation, prescribe that such types of cases or situations with respect to which it finds that compliance with such requirements would be oppressive, or would be inconsistent with the purposes of this act, provide for registration and reporting for work by mail or through other governmental agencies.

(b) He has made a claim for benefits in accordance with the provisions of section 87-107(a).

(c) He is able to work and is available for work and is seeking work, provided, however, that no claimant shall be considered ineligible in any week of unemployment for failure to comply with the provisions of this subsection if such failure is due to an illness or disability which occurs after he has registered for work and no suitable work has been offered to such claimant after the beginning of such illness or disability.

(d) Prior to any week for which he claims benefits he has been totally unemployed for a waiting period of two (2) weeks. No week shall be counted as a week of total unemployment for the purposes of this subsection:

- (1) If benefits have been paid with respect thereto;
- (2) Unless the individual was eligible for benefits with respect thereto;
- (3) Unless it occurs within the benefit year of the claimant;

(4) Unless it occurs after benefits first could become payable to any individual under this act.

(e) He has within the base period earned wages for employment by employers equal to thirty (30) times his weekly benefit amount.

History: En. Sec. 4, Ch. 137, L. 1937; amd. Sec. 2, Ch. 137, L. 1939; amd. Sec. 2, Ch. 164, L. 1941; amd. Sec. 1, Ch. 233, L. 1943; amd. Sec. 1, Ch. 190, L. 1945.

Payments Exceeding or Including Waiting Period Properly Denied

Where the applicant preferred a claim for the first three days of his unemployment, held, that the commission, limited in its acts by the statute, could not legally have allowed the claim and properly denied it since the act provides for a waiting period of two weeks before the applicant shall be eligible to receive benefits in

any event, and the district court erred in allowing it, and further went beyond its jurisdiction by directing payment for the entire period of unemployment. *Jordan v. Craighead*, 114 M 337, 346, 136 P 2d 526.

48 Am. Jur. 538, Social Security, Unemployment Insurance, and Retirement Funds, §§ 34 et seq.

Circumstances of leaving employment, availability for work, or nature of excuse for refusing re-employment, as affecting right to social security or unemployment compensation. 158 ALR 396.

87-106. Disqualification for benefits. An individual shall be disqualified for benefits—

(a) If he has left work voluntarily without good cause, if so found by the commission, for a period of not less than one (1) or more than five (5) weeks (in addition to and immediately following the waiting period), as determined by the commission according to the circumstances in each case.

(b) If he has been discharged for misconduct connected with his work, if so found by the commission, for a period of not less than the one (1) nor more than the nine (9) weeks (in addition to and immediately following the waiting period), as determined by the commission in each case according to the seriousness of the misconduct.

(c) If the commission finds that he has failed, without good cause, either to apply for available, suitable work when so directed by the employment office or the commission or to accept suitable work when offered him, or to return to his customary self-employment (if any) when so directed by the commission. Such disqualification shall continue for the week in which such failure occurred and for not less than the one (1) nor more than the five (5) weeks which immediately follow such week (in addition to the waiting period) as determined by the commission according to the circumstances in each case.

(1) In determining whether or not any work is suitable for an individual, the commission shall consider the degree of risk involved to his health, safety, and morals, his physical fitness and prior training, his experience and previous earnings, his length of unemployment and prospects for securing local work in his customary occupation, and the distance of the available work from his residence.

(2) Notwithstanding any other provisions of this act no work shall be deemed suitable and benefits shall not be denied under this act to any otherwise eligible individual for refusing to accept new work under any of the following conditions:

(a) If position offered is vacant due directly to a strike, lockout, or other labor dispute;

(b) If the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality;

(c) If as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization.

(d) For any week with respect to which the commission finds that his total unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment, or other premises at which he is or was last employed, provided that this subsection shall not apply if it is shown to the satisfaction of the commission that—

(1) He is not participating in or financing or directly interested in the labor dispute which caused the stoppage of work; and

(2) He does not belong to a grade or class of workers of which immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating in or financing or directly interested in the dispute;

Provided, that if in any case separate branches of work which are commonly conducted as separate businesses in separate premises are conducted in separate departments of the same premises, each such department shall, for the purposes of this subsection, be deemed to be a separate factory, establishment, or other premises; provided, further, that if the commission, upon investigation, shall find that such labor dispute is caused by the failure or refusal of any employer to conform to the provisions of any law of the state of Montana or of the United States pertaining to collective bargaining, hours, wages or other conditions of work, such labor dispute shall not render the workers ineligible for benefits.

(e) For any week with respect to which he is receiving or has received payment in the form of—

(1) Wages in lieu of notice or separation or termination allowance;

(2) Compensation for temporary or total disability under the workmen's compensation law of this, or, any state or under a similar law of the United States;

(3) Old age benefit payments under Title II of the social security act, as amended, or benefits under the federal old age and survivors' insurance act, or similar payments under any act of congress or state law;

(4) Benefits under the railroad unemployment insurance act or any state unemployment compensation act or similar laws of any state or of the United States.

(f) During the school term or customary vacation periods within the school term, if claimant has left his most recent work for the purpose of attending an established educational institution, or if claimant is a student regularly attending an established educational institution.

(g) For any week wherein claimant leaves her most recent work to be married. Such disqualification shall continue until such time as subsequently to such week additional wage credits in employment for employers shall have been earned so as to be eligible for benefits under Section 87-105.

History: En. Sec. 5, Ch. 137, L. 1937; amd. Sec. 3, Ch. 164, L. 1941.

Subd. (d)

Labor Dispute Must Be Caused by Failure or Refusal by Employer to Conform to a Law

Under this section, an applicant for compensation is ordinarily ineligible for benefits if his unemployment is due to a labor dispute in which he participates or is interested, unless the commission finds that the dispute was caused by the employer's failure or refusal to conform to the provisions of any law, federal or state, pertaining to collective bargaining, hours of work, wages or other conditions of work. *Jordan v. Craighead*, 114 M 337, 343, 136 P 2d 526.

48 Am. Jur., Social Security, Unemployment Insurance, and Retirement Funds, pp. 538, 540, §§ 35, 36; p. 541, § 38.

Construction and application of provisions of social security or unemployment compensation acts regarding disqualification for benefits because of labor disputes or strikes. 135 ALR 920 and 148 ALR 1309.

What amounts to "misconduct" which precludes benefits under unemployment compensation act to discharge employees. 146 ALR 243.

Termination of disqualification due to labor dispute, for unemployment benefits, in case of other employment which is itself terminated. 154 ALR 1088.

Power of administrative officer to limit period of disqualification for unemployment benefits. 155 ALR 411.

87-107. Claims for benefits. (a) **Filing.** Claims for benefits shall be made in accordance with such regulations as the commission may prescribe. Each employer shall post and maintain printed statements of such regulations in places readily accessible to individuals in his service and shall make available to each such individual at the time he becomes unemployed, a printed statement of such regulations. Such printed statements shall be supplied by the commission to each employer without cost to him.

(b) **Initial determination.** A representative designated by the commission, and hereinafter referred to as a deputy, shall promptly examine the claim and, on the basis of the facts found by him, shall either determine whether or not such claim is valid, and if valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and the maximum duration thereof, or shall refer such claim or any question involved therein to an appeal tribunal which shall make its decisions with respect thereto in accordance with the procedure prescribed in subsection (c) of this section, except that in any case in which the payment or denial of benefits will be determined by the provisions of section 87-106 (d), the deputy shall promptly transmit his full finding of fact with respect to that subsection to the commission, which, on the basis of the evidence submitted and such additional evidence as it may require, shall affirm, modify, or set aside such findings of fact and transmit to the deputy a decision upon the issues involved under that subsection which shall be deemed the decision of the deputy. The deputy shall promptly notify the claimant and any other interested party of the decision and the reasons therefor. The deputy may for good cause reconsider his decision and shall promptly notify the claimant and such other interested parties of his amended decision and the reasons therefor. Unless the claimant or any such interested party, within five calendar days after the delivery of such notification, or within seven calendar days after such notification was mailed to his last known address, files an appeal from such decision, such decision shall be final and benefits shall be paid or denied in accordance therewith. If an appeal is duly filed, benefits with respect to the period prior to the final decision of the commission, shall be paid only after such decision. Provided, that if an appeal tribunal affirms a decision of a deputy, or the commission affirms a decision of

an appeal tribunal, allowing benefits, such benefits shall be paid regardless of any appeal which may thereafter be taken, but if such decision is finally reversed, no employer's account shall be charged with benefits so paid.

(c) Appeals. Unless such appeal is withdrawn, an appeal tribunal, after affording the parties reasonable opportunity for fair hearing, shall affirm or modify the findings of fact and decision of the deputy. The parties shall be duly notified of such tribunal's decision, together with its reasons therefor, which shall be deemed to be the final decision of the commission, unless within ten days after the date of notification or mailing of such decision, further appeal is initiated pursuant to subsection (e) of this section,

(d) Appeal tribunals. To hear and decide disputed claims, the commission shall appoint such impartial appeal tribunals as are necessary for the proper administration of this act, consisting in each case of either a salaried examiner selected in accordance with section 87-123, or a body consisting of three members, one of whom shall be a salaried examiner, who shall serve as chairman, one of whom shall be a representative of employers, and the other of whom shall be a representative of employees; each of the latter two members shall serve at the pleasure of the commission and be paid a fee of not more than \$10.00 per day of active service on such tribunal plus necessary expense. No person shall participate on behalf of the commission in any case in which he is an interested party. The commission may designate alternates to serve in the absence or disqualification of any member of an appeal tribunal. The chairman shall act alone in the absence or disqualification of any other member and his alternates. In no case shall the hearings proceed unless the chairman of the appeal tribunal is present.

(e) Commission review. The commission may on its own motion affirm, modify, or set aside any decision of an appeal tribunal on the basis of the evidence previously submitted in such case, or direct the taking of additional evidence, or may permit any of the parties to such decision to initiate further appeals before it. The commission shall permit such further appeal by any of the parties interested in a decision of an appeal tribunal which is not unanimous and by the deputy whose decision has been overruled or modified by an appeal tribunal. The commission may remove to itself or transfer to another appeal tribunal the proceedings on any claim pending before an appeal tribunal. Any proceedings so removed to the commission shall be heard by a quorum thereof in accordance with the requirements in subsection (c) of this section. The commission shall promptly notify the interested parties of its findings and decision.

History: En. Sec. 6(a) to (e), Ch. 137, 48 Am. Jur. 544, Social Security, Unemployment Insurance, and Retirement Funds, §§ 43 et seq.

87-108. Procedure and appeals. (a) Procedure. The manner in which disputed claims shall be presented, the reports thereon required from the claimant and from employers, and the conduct of hearings and appeals shall be in accordance with regulations prescribed by the commission for determining the rights of the parties, whether or not such regulations conform to common law or statutory rules of evidence and other technical rules or procedure. A full and complete record shall be kept of all proceedings in connection with a disputed claim. All testimony at any hearing upon a dis-

puted claim shall be recorded, but need not be transcribed unless the disputed claim is further appealed. The commission shall have continuing jurisdiction over all claims filed for benefits to revise, modify, alter, cancel and amend all orders, findings and determinations made therein at any time and shall not lose such jurisdiction unless and until the jurisdiction of such claim and subject matter thereof has been taken by a court of competent jurisdiction in a proceedings filed therein as provided for in subsection (d) of this section.

(b) Witness fees. Witnesses subpoenaed pursuant to this section shall be allowed fees at a rate fixed by the commission. Such fees shall be deemed a part of the expense of administering this act.

(c) Appeal to courts. Any decision of the commission in the absence of an appeal therefrom as herein provided shall become final ten days after the date of notification or mailing thereof, and judicial review thereof shall be permitted only after any party claiming to be aggrieved thereby has exhausted his remedies before the commission as provided by this act. The commission shall be deemed to be a party to any judicial action involving any such decision, and may be represented in any such judicial action by any qualified attorney employed by the commission and has been designated by it for that purpose, or at the commission's request, by the attorney general.

(d) Court review. Within ten days after the decision of the commission has become final, any party aggrieved thereby may secure judicial review thereof by commencing an action in the district court of the county in which said party resides against the commission for the review of its decision, in which action any other party to the proceeding before the commission shall be made a defendant. In such action, a petition which need not be verified, but which shall state the grounds upon which a review is sought, shall be served upon a member of the commission or upon such person as the commission may designate and such service shall be deemed completed service on all parties, but there shall be left with the party so served as many copies of the petition as there are defendants and the commission shall forthwith mail one such copy to each such defendant. With its answer, the commission shall certify and file with said court all documents and papers and a transcript of all testimony taken in the matter, together with its findings of fact and decision therein. The commission may also in its discretion, certify to such court questions of law involved in any decision by it. In any judicial proceeding under this section, the findings of the commission as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of said court shall be confined to questions of law. Such action, and the questions so certified, shall be heard in a summary manner and shall be given precedence over all other civil cases except cases arising under the workmen's compensation law of this state. An appeal may be taken from the decision of the said district court to the supreme court of Montana in the same manner, but not inconsistent with the provisions of this act, as is provided in civil cases. It shall not be necessary, in any judicial proceeding under this section, to enter exceptions to the rulings of the commission and no bond shall be required for entering such appeal. Upon the final determination of such

judicial proceeding, the commission shall enter an order in accordance with such determination. A petition for judicial review shall not act as a supersedeas or stay unless the commission shall so order.

History: En. Sec. 6 (f) to (i), Ch. 137, L. 1937; Subd. (a) amd. Sec. 2, Ch. 233, L. 1943.

Subd. (d)

When Findings of Commission Conclusive Upon Courts

The provision of this subsection that the findings of the commission as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive, held to mean not a mere scintilla, but substantial evidence, or such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; in a judicial review of the commission's decision, the district court is precluded from considering the preponderance of the evidence, and is limited to questions of law,

the question whether there is substantial evidence to sustain them being one of law. *Jordan v. Craighead*, 114 M 337, 342, 136 P 2d 526.

Witnesses—14.

70 C.J. Witnesses § 43.

48 Am. Jur. 546, Social Security, Unemployment Insurance, and Retirement Funds, §§ 46 et seq.

Exhaustion of administrative remedies as condition of resort to court in respect of right claimed under social security or old age acts. 130 ALR 882.

Construction and application of state social security or unemployment compensation act as affected by terms of the Federal act or judicial or administrative rulings thereunder. 139 ALR 892.

87-109. Contributions. (a) Payment. (1) On and after January 1, 1937, contributions shall accrue and become payable by each employer for each calendar year in which he is subject to this act, with respect to wages, as defined in section 87-149 (c), paid for employment (as defined in this act) occurring during such calendar year. Such contributions shall become due and be paid by each employer to the commission for the fund in accordance with such regulations as the commission may prescribe and shall not be deducted, in whole or in part, from the wages of individuals in his employ.

(2) In the payment of any contributions, a fractional part of a cent shall be disregarded unless it amounts to one-half ($\frac{1}{2}$) cent or more, in which case it shall be increased to one (1) cent.

(b) Rate of contribution. (1) Each employer shall pay contributions equal to the following percentages of wages, as defined in section 87-149 (c) paid by him with respect to employment.

(A) One and eight-tenths (1.8) per centum with respect to employment during the calendar year 1937;

(B) Two and seven-tenths (2.7) per centum with respect to employment during the calendar years 1938, 1939, 1940, 1941, and for each calendar year thereafter, except as herein provided in subsection (C) of this section;

(C) Experience rating. The commission shall for the calendar year 1947, and for each calendar year thereafter, classify employers in accordance with their actual contribution and unemployment experience and shall determine for each employer the rate of contribution which shall apply to him throughout the calendar year in order to reflect said experience and classification.

The commission shall apply such form of classification or experience rating system which is best calculated to rate individually and most equitably the employment for each employer and to encourage the stabilization of employment.

In making such classification, the commission shall take account, each to an equal extent, of the following factors relating to the unemployment

hazard shown by each employer on the basis of (1) average annual percentage declines in taxable payrolls for the last three (3) preceding calendar years; (2) number of years the employer has paid contributions; and (3) chargebacks to the individual employer account upon the last employer basis. The computation date is hereby fixed as of the close of business on June 30th of the preceding calendar year.

The rates for the calendar year 1947, and thereafter, except as hereinafter provided, shall be so fixed that they would, if applied to all employers and their total taxable annual payrolls for the preceding calendar year, have yielded total paid contributions equalling approximately one and eight-tenths (1.8) per centum of the total of all such annual payrolls.

The commission shall determine the contribution rate applicable to each employer for any calendar year subject to the following limitations:

(1) Each employer's rate shall be two and seven-tenths (2.7) per centum unless and until there have been five calendar years throughout which the employer has paid contributions at the rate of two and seven-tenths (2.7) per centum.

(2) No employer's contribution rate shall be less than one (1) per centum.

(3) No employer's contribution rate shall be more than two and seven-tenths (2.7) per centum.

(4) The classified contribution rates for the calendar year 1947, and thereafter, except as hereinafter provided, shall be: one (1) per centum, one and one-half (1.5) per centum, two (2.0) per centum, two and one-half (2.5) per centum, and two and seven-tenths (2.7) per centum.

(5) Rates as fixed by the commission shall stand and be in effect unless and until the cash reserves in the unemployment compensation trust fund at any time in the future fall below eighteen million dollars (\$18,000,000.00), then the contribution rate of all employers subject to this act shall immediately return to a uniform rate of two and seven-tenths (2.7) per centum, and shall continue at the two and seven-tenths (2.7) per centum rate until cash reserves in the unemployment compensation trust fund exceed twenty-two million dollars (\$22,000,000.00).

(6) No employer's rate shall be fixed below two and seven-tenths (2.7) per centum whose average benefit payments charged as most recent employer have, in the three preceding calendar years, exceeded the average amount of his contributions for those years.

(7) The commission shall by regulation adopt such procedures as may be necessary for the substitution, merging or acquisition of an employer account by an employing unit, and the transfer of such employer account, rights, contributions, benefit experience and ratings to the successor employing unit or units.

(8) The commission shall by regulation provide for the proper notification of employers of the classification and rate of contributions applicable to their accounts. Such notification shall be final for all purposes unless and until such employer files a written request with the commission for a redetermination or hearing thereon within thirty (30) days after receipt of such notice. The provisions of section 87-107 applicable to appeals under claims procedure shall apply with like purpose and effect, and be applicable

to hearings and request for redeterminations of classification and rates of contribution filed by employers hereunder.

(9) "Annual taxable pay roll" means the total of the four quarters of taxable pay rolls of an employer preceding the computation date as fixed herein.

(D) Wages in excess of three thousand dollars. Commencing January 1, 1941, the provisions of this act requiring the payment of contributions by employers subject to this act shall apply only to wages paid up to and including three thousand (\$3,000.00) dollars by an employer to an employee with respect to employment during any calendar year.

History: En. Sec. 7, Ch. 137, L. 1937; amd. Sec. 3, Ch. 137, L. 1939; amd. Sec. 4, Ch. 164, L. 1941; amd. Sec. 2, Ch. 245, L. 1947.

employment Insurance, and Retirement Funds, §§ 32 et seq.

Taxation—59.

61 C.J. Taxation § 123 et seq.

48 Am. Jur. 536, Social Security, Un-

Construction and application of provision in social security or unemployment compensation acts excluding from the basis of contribution remuneration in excess of a named amount paid to employee. 159 ALR 1197.

87-110. Period, election and termination of employer's coverage. (a) Any employing unit which is or becomes an employer subject to this act within any calendar year, shall be subject to this act during the whole of such calendar year.

(b) Except as otherwise provided in subsection (c) of this section an employing unit shall cease to be an employer subject to this act only as of the first day of January, of any calendar year, only if it files with the commission prior to the last day of February, of such year, a written application for termination of coverage, and the commission finds that there were no twenty (20) different days, each day being in a different week within the preceding calendar year within which such employing unit employed one (1) or more individuals in an employment subject to this act, or the total wages payable for employment by said employer in the preceding calendar year did not exceed five hundred (\$500.00) dollars. For the purposes of this subsection, the two (2) or more employing units mentioned in paragraph (2) or (3) of section 87-148 (i) shall be treated as a single employing unit.

(c) An employing unit not otherwise subject to this act, which files with the commission its written election to become an employer subject hereto for not less than two (2) calendar years, shall, with the written approval of such election by the commission become an employer subject hereto to the same extent as all other employers as of the date stated in such approval, and shall cease to be subject hereto as of January 1, of any calendar year, subsequent to such two (2) calendar years only if at least thirty (30) days prior to said first day of January it has filed with the commission a written notice to that effect.

Any employing unit for which services that do not constitute employment as defined in this act, are performed may file with the commission, a written election that all such services performed by individuals in its employ in one (1) or more distinct establishments or places of business shall be deemed to constitute employment for all purposes of this act for not less than two (2) calendar years. Upon the written approval of such election

by the commission, such services shall be deemed to constitute employment subject to this act from and after the date stated in such approval. Such services shall cease to be deemed employment subject hereto as of January 1, of any calendar year subsequent to such two (2) calendar years only if at least thirty (30) days prior to such first day of January such employing unit has filed with the commission a written notice to that effect.

History: En. Sec. 8, Ch. 137, L. 1937; 48 Am. Jur. 536, Social Security, Unem-
amd. Sec. 4, Ch. 137, L. 1939; amd. Sec. 5, ployment Insurance, and Retirement
Ch. 164, L. 1941. Funds, §§ 32 et seq.

87-111. Unemployment compensation fund. Establishment and control. There is hereby established as a special fund, separate and apart from all public moneys or funds of this state, an unemployment compensation fund, which shall be administered by the commission exclusively for the purposes of this act. This fund shall consist of (1) all contributions collected under this act; (2) interest earned upon any moneys in the fund; (3) any property or securities acquired through the use of moneys belonging to the fund; and (4) all earnings of such property or securities. All moneys in the fund shall be mingled and undivided.

History: En. Subd. (a), Sec. 9, Ch. 137,
L. 1937; amd. Sec. 2, Ch. 190, L. 1945.

87-112. Accounts and deposit. The state treasurer shall be ex officio the treasurer and custodian of the fund who shall administer such fund in accordance with the directions of the commission and shall issue his warrants upon it in accordance with such regulations as the commission shall prescribe. He shall maintain within the fund three separate accounts: (1) a clearing account, (2) an unemployment trust fund account, and (3) a benefit account. All moneys payable to the fund, upon receipt thereof by the commission, shall be forwarded to the treasurer who shall immediately deposit them in the clearing account. Refunds payable pursuant to sections 87-135 to 87-139 may be paid from the clearing account upon warrants issued by the treasurer under the direction of the commission. After clearance thereof, all other moneys in the clearing account shall be immediately deposited with the secretary of the treasury of the United States of America to the credit of the account of this state in the unemployment trust fund, established and maintained pursuant to section 904 of the social security act, as amended, any provision of law in this state relating to the deposit, administration, release, or disbursement of moneys in the possession or custody of this state to the contrary notwithstanding. The benefit account shall consist of all moneys requisitioned from this state's account in the unemployment trust fund. Except as herein otherwise provided, moneys in the clearing and benefit accounts may be deposited by the treasurer, under the direction of the commission, in any bank or public depository in which general funds of the state may be deposited but no public deposit insurance charge or premium shall be paid out of the fund. The treasurer shall give a separate bond conditioned upon the faithful performance of his duties as custodian of the fund in an amount fixed by the commission and in a form prescribed by law or approved by the attorney general. Premiums for said bond shall be paid from the administration fund.

History: En. Subd. (b), Sec. 9, Ch. 137,
L. 1937.

87-113. Withdrawals. Moneys shall be requisitioned from this state's account in the unemployment trust fund solely for the payment of benefits and in accordance with regulations prescribed by the commission. The commission shall from time to time requisition from the unemployment trust fund such amounts, not exceeding the amounts standing to this state account therein, as it deems necessary for the payment of benefits for a reasonable future period. Upon receipt thereof the treasurer shall deposit such moneys in the benefit account and shall issue his warrants for the payment of benefits solely from such benefit account. Expenditures of such moneys in the benefit account and refunds from the clearing account shall not be subject to any provisions of law requiring specific appropriations or other formal release by state officers of money in their custody. All warrants issued by the treasurer for the payment of benefits and refunds shall bear the signature of the treasurer and the counter signature of a member of the commission or its duly authorized agent for that purpose. Any balance of moneys requisitioned from the unemployment trust fund which remains unclaimed or unpaid in the benefit account after the expiration of the period for which such sums were requisitioned shall either be deducted from estimates for, and may be utilized for the payment of, benefits during succeeding periods, or, in the discretion of the commission, shall be redeposited with the secretary of the treasury of the United States of America, to the credit of this state's account in the unemployment trust fund, as provided in section 87-112.

History: En. Subd. (c), Sec. 9, Ch. 137,
L. 1937.

87-114. Disbursement of funds if federal act becomes inoperative. If Title III or IX of the federal social security act is declared unconstitutional or in any way is inoperative, this act automatically becomes inoperative under the provisions of this act, and the funds which then remain in the unemployment trust fund shall immediately be paid to the state treasurer to be paid into the unemployment compensation fund and funds there held shall be immediately distributed, upon order of the commission, to the employers who have contributed thereto on a proportionate basis. If any part thereof remains undistributed for a period of one (1) year it shall be paid to the general fund of the state of Montana.

History: En. Subd. (d), Sec. 9, Ch. 137, Taxation ~~535~~.
L. 1937. 61 C.J. Taxation § 1254 et seq.

87-115. Transfers from unemployment compensation trust fund to railroad unemployment insurance account authorized. Notwithstanding any requirements of sections 87-111 to 87-114, the unemployment compensation commission of Montana, shall, prior to July 1, 1939, authorize and direct the secretary of the treasury of the United States to transfer from the unemployment compensation trust fund for the state of Montana, established and maintained pursuant to section 904 of the federal social security act, as amended, to the railroad unemployment insurance account established and maintained pursuant to section 10 of the railroad unemployment insurance act (52 Stat. 1094), an amount hereinafter referred to as the preliminary amount; and shall, prior to December 31, 1939, authorize and direct the secretary of the treasury of the United States to transfer from

the Montana unemployment compensation trust fund to said railroad unemployment insurance account an additional amount, hereinafter referred to as the liquidating amount. The preliminary amount shall consist of that proportion of the balance in the employment compensation trust fund as of June 30, 1939, as the total amount of contributions collected from "employers" (as the term employer is defined in section 1 (a) of the railroad unemployment insurance act) and credited to the Montana unemployment compensation trust fund bears to all contributions theretofore collected under this act and credited to such fund. The liquidating amount shall consist of the total amount of contributions collected from "employers" (as the term employer is defined in section 1 (a) of the railroad unemployment insurance act) pursuant to the provisions of this act during the period from July 1, 1939, to December 31, 1939, inclusive.

History: En. Sec. 1, Ch. 167, L. 1939.

87-116. Agreements with railroad retirement board. The unemployment compensation commission of Montana is hereby authorized to cooperate with and enter into agreements with the railroad retirement board with respect to establishment, maintenance and use of Montana state employment service facilities, and to make available to the said railroad retirement board the records of the commission relating to employer's status and contributions received from employers covered by the railroad unemployment insurance act, together with employee wage records and such other data as the railroad retirement board may deem necessary or desirable for the administration of the railroad unemployment insurance act (52 Stat. 1094); that any monies received by the unemployment compensation commission of Montana from the railroad retirement board or any other governmental agency with respect to the establishment, maintenance and use of Montana state employment service facilities, shall be paid into and credited the proper division of the unemployment compensation administration fund set up and established under sections 87-133 and 87-134.

History: En. Sec. 2, Ch. 167, L. 1939.

87-117. Unemployment compensation commission—organization. There is hereby created a commission to be known as the unemployment compensation commission of Montana. The commission shall consist of three members who shall be appointed by the governor on a nonpartisan merit basis within sixty days after the passage of this act and after any vacancy occurs in its membership. Two of the members of the commission shall serve on a per diem basis and shall be paid at the rate of ten dollars (\$10.00) per day of service plus actual and necessary expenses, provided, however, that the total per diem compensation in any one year for each of the said two members shall not exceed the sum of five hundred dollars (\$500.00). Each per diem member shall hold office for a term of six years, except that (1) a member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term; and (2) the terms of office of the member first taking office after the date of enactment of this act shall expire, as designated by the governor at the time of appointment, one at the end of three years, the other at the end of six years. The third member of the

commission, who shall be designated as chairman at the time of his appointment, shall be paid a full-time salary in an amount to be fixed by the governor and shall be the executive director. During his term of membership on the commission no member shall serve as an officer or committee member of any political party organization. The governor may at any time, after notice and hearing, remove any commissioner for inefficiency, neglect of duty, malfeasance, misfeasance, or nonfeasance in office.

History: En. Subd. (a), Sec. 10, Ch. States 45.
137, L. 1937. 59 C.J. States § 143½.

87-118. Divisions. The commission shall establish two coordinate divisions: The Montana state employment service division created pursuant to section 87-132, and the unemployment compensation division. Each division shall be responsible to the executive director for the discharge of its distinctive function. Each division shall be a separate administrative unit with respect to personnel, budget, and duties except insofar as the commission may find that such separation is impracticable.

History: En. Subd. (b), Sec. 10, Ch.
137, L. 1937.

87-119. Quorum. Any two commissioners shall constitute a quorum. No vacancy shall impair the right of the remaining commissioners to exercise all of the powers of the commission.

History: En. Subd. (c), Sec. 10, Ch. States 67.
137, L. 1937. 59 C.J. States § 118 et seq.

87-120. Administration—duties and powers of commission. It shall be the duty of the commission to administer this act; and it shall have power and authority to adopt, amend, or rescind such rules and regulations, to employ such persons, make such expenditures, require such reports, make such investigations, and take such other action as it deems necessary or suitable to that end. Such rules and regulations shall be effective upon publication in the manner, not inconsistent with the provisions of this act, which the commission shall prescribe. The commission shall determine its own organization and methods of procedure in accordance with the provisions of this act, and shall have an official seal which shall be judicially noticed. Not later than the 1st day of February of each year, the commission shall submit to the governor a report covering the administration and operation of this act during the preceding calendar year and shall make such recommendations for amendments to this act as the commission deem proper. Such report shall include a balance sheet of the moneys in the fund in which there shall be provided, if possible, a reserve against the liability in future years to pay benefits in excess of the then current contributions, which reserve shall be set up by the commission in accordance with accepted actuarial principles on the basis of statistics of employment, business activity, and other relevant factors for the longest possible period. Whenever the commission believes that a change in contribution or benefit rates will become necessary to protect the solvency of the fund, it shall promptly so inform the governor and the legislature, and make recommendations with respect thereto.

History: En. Subd. (a), Sec. 11, Ch.
137, L. 1937.

87-121. Regulations and general and special rules. General and special rules may be adopted, amended, or rescinded by the commission only after public hearing or opportunity to be heard thereon, of which proper notice has been given. General rules shall become effective ten days after filing with the secretary of the state and publication in one or more newspapers of general circulation in this state. Special rules shall become effective ten days after notification to or mailing to the last known address of the individuals or concerns affected thereby. Regulations may be adopted, amended, or rescinded by the commission and shall become effective in the manner and at the time prescribed by the commission.

History: En. Subd. (b), Sec. 11, Ch. 137, L. 1937.

87-122. Publication. The commission shall cause to be printed for distribution to the public the text of this act, the commission's regulations and general and special rules, its annual reports to the governor, and any other material the commission deems relevant and suitable and shall furnish the same to any person upon application therefor.

History: En. Subd. (c), Sec. 11, Ch. 137, L. 1937.

87-123. Personnel. Subject to other provisions of this act, the commission is authorized to appoint, fix the compensation and prescribe the duties and powers of such officers, accountants, attorneys, experts, and other persons as may be necessary in the performance of its duties under this act. The commission may delegate to any such persons such power and authority as it deems reasonable and proper for the effective administration of this act, and may in its discretion bond any person handling money or signing checks hereunder. The commission shall classify positions under this act and shall establish salary schedules and minimum personnel standards for the positions so classified. The commission shall provide for the holding of examinations to determine the qualifications of applicants for the positions so classified, and except for temporary appointments of not to exceed six months in duration, such personnel shall be appointed on the basis of efficiency and fitness as determined in such examinations. No person who is an officer or committee member of any political party organization or who holds or is a candidate for any public office shall be appointed or employed under this act. The commission shall establish and enforce fair and reasonable regulations for appointments, promotions, and demotions based upon ratings of efficiency and fitness and for terminations for cause.

History: En. Subd. (d), Sec. 11, Ch. 137, L. 1937.

87-124. Records and reports. Each employing unit shall keep true and accurate work records, containing such information as the commission may prescribe. Such records shall be open to inspection and shall be subject to being copied by the commission or its authorized representative at any reasonable time and as often as may be necessary. The commission and the chairman of any appeal tribunal may require from any employing unit any sworn or unsworn reports with respect to persons employed by it which

the commission deems necessary to the effective administration of this act. Information thus obtained or obtained from any individual pursuant to the administration of this act shall except to the extent necessary for the proper presentation of a claim be held confidential and shall not be published or be open to public inspection (other than to public employees in the performance of their public duties) in any manner revealing the individual's or employing unit's identity, but any claimant or his legal representative at a hearing before the commission or appeal tribunal shall be supplied with information from such records to the extent necessary for the proper presentation of his claim. Any employee or member of the commission who violates any provision of this section shall be fined not less than twenty dollars nor more than two hundred dollars, or imprisoned for not longer than 90 days, or both.

History: En. Subd. (e), Sec. 11, Ch. 137, L. 1937.

87-125. Oaths and witnesses. In the discharge of the duties imposed by this act, the chairman of an appeal tribunal and any duly authorized representative or member of the commission shall have power to administer oaths and affirmations, take depositions, certify to official acts, and issue subpoenas to compel the attendance of witnesses and the production of books, papers, correspondence, memoranda, and other records deemed necessary as evidence in connection with a disputed claim or the administration of this act.

History: En. Subd. (f), Sec. 11, Ch. 137, L. 1937.

87-126. Subpoenas. In case of contumacy by, or refusal to obey a subpoena issued to any person, any court of this state within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the chairman of an appeal tribunal, the commission or any duly authorized representative of any of them shall have jurisdiction to issue to such person an order requiring such person to appear before the chairman of an appeal tribunal, a commissioner, the commission, or any duly authorized representative of any of them there to produce evidence if so ordered or there to give testimony touching the matters under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof. Any person who shall without just cause fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, and other records, if it is in his power to do so, in obedience to a subpoena of the commission, the chairman of an appeal tribunal or any duly authorized representative of any of them shall be punished by a fine of not more than \$200 or by imprisonment for not longer than sixty days, or by both such fine and imprisonment, and each day such violation continues shall be deemed to be a separate offense.

History: En. Subd. (g), Sec. 11, Ch. 137, L. 1937.

87-127. Protection against self-incrimination. No person shall be excused from attending and testifying or from producing books, papers, corre-

spondence, memoranda, and other records before the commission, the chairman of an appeal tribunal or any duly authorized representative of any of them or in obedience to the subpoena of the commission or any member thereof or any duly authorized representative of the commission in any cause or proceeding before the commission, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

History: En. Subd. (h), Sec. 11, Ch. 137, L. 1937.

22 C.J.S. Criminal Law §§ 41, 46; 70 C.J. Witnesses §§ 880 et seq., 892.

Criminal Law 42; Witnesses 295, 297.

Necessity and sufficiency of assertion of privilege against self-incrimination as condition of statutory immunity of witness from prosecution. 145 ALR 1416.

87-128. State-federal cooperation. In the administration of this act, the commission shall cooperate to the fullest extent consistent with the provisions of this act, with the social security board, created by the social security act, approved August 14, 1935, as amended; shall make such reports, in such form and containing such information as the social security board may from time to time require, and shall comply with such provisions as the social security board may from time to time find necessary to assure the correctness and verification of such reports; and shall comply with the regulations prescribed by the social security board governing the expenditures of such sums as may be allotted and paid to this state under Title III of the social security act for the purpose of assisting in the administration of this act.

Upon request therefor the commission shall furnish to any agency of the United States charged with the administration of public works or assistance through public employment, the name, address, ordinary occupation, and employment status of each recipient of benefits and such recipient's rights to further benefits under this act.

History: En. Subd. (i), Sec. 11, Ch. 137, L. 1937.

87-129. Reciprocal benefit arrangements. The commission is hereby authorized to enter into arrangements with the appropriate agencies of other states or the federal government, whereby individuals performing services in this and other states for a single employing unit under circumstances not specifically provided for in this act, or under similar provisions of the unemployment compensation laws of such other states, shall be deemed to be engaged in employment performed entirely within this state or within one of such other states and whereby potential rights to benefits accumulated under the unemployment compensation laws of several states or under such a law of the federal government, or both, may constitute the basis for the payment of benefits through a single appropriate agency under

terms which the commission finds will be fair and reasonable as to all affected interests, and will not result in any substantial loss to the fund.

The commission is also authorized to enter into arrangements with the appropriate agencies of the other states or of the federal government (i) whereby wages or services, upon the basis of which an individual may become entitled to benefits under the unemployment compensation law of another state or of the federal government, shall be deemed to be wages for employment by employers for benefit purposes; provided such other state agency or agency of the federal government has agreed to reimburse the unemployment compensation fund for such portion of benefits paid under this act upon the basis of such wages or services as the commission finds will be fair and reasonable as to all affected interests; and (ii) whereby the commission will reimburse other state or federal agencies charged with the administration of unemployment compensation laws, with such reasonable portion of benefits, paid under the law of any such other states or of the federal government upon the basis of employment or wages for employment by employers, as the commission finds will be fair and reasonable to all affected interests. Reimbursements so payable shall be deemed to be benefits for the purposes of this act. The commission is hereby authorized to make to other state or federal agencies and receive from such other state or federal agencies, reimbursements from or to the unemployment compensation fund, in accordance with arrangements made pursuant to this section.

History: En. Subd. (j), Sec. 11, Ch. 137, L. 1937; amd. Sec. 3, Ch. 190, L. 1945.

87-130. Acquisition of property, etc. Subject to the approval of the state board of examiners the commission may purchase such equipment, supplies, and real property as it may deem necessary and proper. The title to any real property purchased shall be taken in the name of the state of Montana. In the event the duties, or any part thereof, of the commission shall be at any time in the future surrendered to or taken over by the federal government or any agency thereof, the commission, with the approval of the state board of examiners, may lease such equipment and real property to the federal government, or such agency, but the title thereto shall remain in the state of Montana.

History: En. Sec. 6, Ch. 233, L. 1943.

87-131. Commission to cooperate with other agencies. The commission shall afford reasonable cooperation with any government agency charged with war effort or post-war planning responsibilities or with the administration of any system of unemployment allowances or unemployment assistance or of any program designed to prevent or relieve unemployment. The commission may make, and may cooperate with other appropriate state agencies in making studies as to the practicability and probable cost of possible new state-administered social security programs; and the relative desirability of state (rather than national) action in any such field. The commission shall fully cooperate with the agencies of other states, and shall make every proper effort within its means, to oppose and prevent any further action which would in its judgment tend to effect complete or substantial federalization of state unemployment compensation funds or

state unemployment compensation and employment security programs, or any part of the social security program.

History: En. Sec. 6, Ch. 233, L. 1943.

87-132. State employment service. The commission shall create a division to be known as the Montana state employment service which division shall establish and maintain free public employment offices in such number and in such places as may be necessary for the proper administration of this act, and for the purpose of performing such duties as are within the purview of the act of congress entitled; "An act to provide for the establishment of a national employment system and for cooperation with the states in the promotion of such system, and for other purposes", approved June 6, 1933 (48 Stat. 113; U. S. C., Title 29, Sec. 49 (e)), as amended. The said division shall be administered by a full time salaried director. The commission shall be charged with the duty to cooperate with any official or agency of the United States having power or duties under the provisions of the said act of congress, as amended, and to do and perform all things necessary to secure to this state the benefits of the said act of congress, as amended, in the promotion and maintenance of a system of public employment offices. The provisions of the said act of congress, as amended, are hereby accepted by this state, in conformity with section 4 of said act, and this state will observe and comply with the requirements thereof. The unemployment compensation commission is hereby designated and constituted the agency of this state for the purpose said act. The commission is directed to appoint the personnel of the Montana state employment service. For the purpose of establishing and maintaining free public employment offices, the commission is authorized to enter into agreements with any political subdivisions of this state or with any private, nonprofit organization, and as a part of any such agreement the commission may accept moneys, services, or quarters as a contribution to the employment service account.

History: En. Sec. 12, Ch. 137, L. 1937; Master and Servant $\text{C}\text{--}14\frac{1}{2}$.
amd. Sec. 6, Ch. 164, L. 1941. 39 C.J. Master and Servant § 55.

87-133. Unemployment compensation administration fund—special fund. There is hereby created in the state treasury a special fund to be known as the unemployment compensation administration fund. All moneys which are deposited, appropriated or paid into this fund are hereby appropriated and made available to the commission. All moneys in the fund shall be expended solely for the purpose of defraying the costs of administration of this act and costs of administration of such other legislation as shall be specifically delegated to the commission for administration by the legislature. All moneys received and deposited in said fund for administrative expense from the social security board, or its successor, pursuant to section 302, title III of the social security act shall be expended solely for the purpose and in the amounts found necessary by the social security board for the proper and efficient administration of this act. The fund shall consist of (1) all moneys received from the social security board, or its successor, pursuant to section 302, title III of the social security act, and (2) all moneys appropriated by the state from the general fund for the purpose of administering this act, all interest and penalties collected on past due contributions

as provided by section 87-135; all moneys, trust funds, supplies, facilities or services furnished, deposited, paid and received from the United States of America, or any agency thereof, from this state or any agency thereof, from any other state or any of its agencies, from political subdivisions of the state, or any other source for administrative expense and purpose. All moneys in this fund shall be deposited, administered, and disbursed in the same manner and under the same conditions and requirements as is provided by law for other special funds in the state treasury. Any balance in this fund shall not lapse at any time, but shall be continuously available to the commission for the expenditure consistent with this act. The state treasurer shall give a separate and additional bond conditioned upon the faithful performance of his duties in connection with the unemployment compensation administration fund in an amount to be fixed by the commission and in a form prescribed by law or approved by the attorney general. The premiums for such bond and the premiums for the bond given by the treasurer for the unemployment compensation fund under section 87-112, shall be paid from the moneys in the unemployment compensation administration fund.

History: En. Subd. (a), Sec. 13, Ch. 137, L. 1937, amd. Sec. 7, Ch. 164, L. 1941; 39 C.J. Master and Servant § 362 et seq.; 59 C.J. States § 378.
amd. Sec. 4, Ch. 190, L. 1945. 48 Am. Jur. 521, Social Security, Unemployment Insurance, and Retirement Funds, § 11.

Master and Servant 78; States 127.

87-134. Reimbursement of fund. This state recognizes its obligation to replace, and hereby pledges the faith of this state that funds will be provided in the future, and applied to the replacement of any moneys received after July 1, 1941, from the social security board under Title III of the social security act, any unencumbered balances in the unemployment compensation administration fund as of that date, any moneys thereafter granted to this state pursuant to the provisions of the Wagner-Peyser act, and any moneys made available by the state or its political subdivisions and matched by such moneys granted to this state pursuant to the provisions of the Wagner-Peyser act, which the social security board finds have, because of any action or contingency, been lost or have been expended for purposes other than, or in amounts in excess of, those found necessary by the social security board for the proper administration of this act. Such moneys shall be promptly supplied by moneys furnished by the state of Montana or any of its subdivisions for the use of the unemployment compensation commission and used only for purposes approved by social security board. The commission shall, if necessary, promptly report to the governor and the governor to the legislature, the amount required for such replacement. This section shall not be construed to relieve this state of its obligation with respect to funds received prior to July 1, 1941, pursuant to the provisions of Title III of the social security act.

History: En. as Subd. (b) of Sec. 13, Ch. 137, L. 1937 by Sec. 7, Ch. 164, L. 1941.

87-135. Penalty and interest on past due contributions. Contributions unpaid on the date on which they are due and payable, as prescribed by the commission, shall be subject to a penalty assessment of five per centum

(5%) or five (\$5.00) dollars, whichever is greater, and shall bear interest at the rate of one-half of one per centum ($\frac{1}{2}$ of 1%) per month from and after such date until payment plus accrued interest and penalty is received by the commission. No interest shall be charged for fractional part of a month. Interest and penalty collected pursuant to this subsection shall be paid into the unemployment compensation administration fund. When failure to pay contributions in time and before delinquency was not caused by wilful intent of the employer, and for good cause shown, the commission may abate the penalty and interest, as a compromise offer of settlement and payment of the tax liability.

History: En. Subd. (a), Sec. 14, Ch. 137, L. 1937; amd. Sec. 5, Ch. 137, L. 1939; amd. Sec. 8, Ch. 164, L. 1941; amd. Sec. 3, Ch. 233, L. 1943; amd. Sec. 5, Ch. 190, L. 1945. Taxation \Rightarrow 528. 61 C.J. Taxation § 2218.

87-136. Collection. If, after due notice, any employer defaults in any payment of contributions or interest thereon, the amount due shall be collected by civil action in the name of the commission, and the employer adjudged in default shall pay the costs of such action. Civil actions brought under this section to collect contributions or interest thereon from an employer shall be heard by the court at the earliest possible date and shall be entitled to preference upon the calendar of the court over all other civil actions except petitions for judicial review under this act and cases arising under the workmen's compensation law of this state. Action for the collection of contributions due shall be brought within five (5) years after the due date of such contributions, otherwise to be barred as provided in section 93-2604.

History: En. Subd. (b), Sec. 14, Ch. 137, L. 1937; amd. Sec. 5, Ch. 137, L. 1939; amd. Sec. 8, Ch. 164, L. 1941. Taxation \Rightarrow 585. 61 C.J. Taxation § 1377.

87-137. Priorities under legal dissolutions or distributions. In the event of any distribution of an employer's assets pursuant to an order of any court under the laws of this state, including any receivership, assignment for benefit of creditors, adjudicated insolvency, composition, or similar proceeding, contributions then or thereafter due shall be paid in full prior to all other claims except taxes and claims for wages of not more than two hundred fifty (\$250.00) dollars to each claimant, earned within six (6) months of the commencement of the proceeding. In the event of an employer's adjudication in bankruptcy, judicially confirmed extension proposal, or composition, under the federal bankruptcy act, contributions then or thereafter due shall be entitled to priority of payment as a debt due the sovereign power as provided by the bankruptcy act of June 22, 1938. (Chap. 575-52 Stat. 840).

History: En. Subd. (c), Sec. 14, Ch. 137, L. 1937; amd. Sec. 5, Ch. 137, L. 1939; amd. Sec. 8, Ch. 164, L. 1941. 48 Am. Jur. 537, Social Security, Unemployment Insurance, and Retirement Funds, § 33.

Rank or priority of lien or claim for unpaid employer's contribution under social security or unemployment compensation act. 140 ALR 1042. Taxation \Rightarrow 509. 61 C.J. Taxation § 1176 et seq.

87-138. Refunds. If not later than three (3) years after the date on which any contributions or interest thereon became due, an employer who has paid such contributions or interest thereon shall make application for an adjustment thereof in connection with subsequent contribution payments, or for a refund thereof because such adjustment cannot be made, and the commission shall determine that such contributions or interest or any portion thereof was erroneously collected, the commission shall allow such employer to make an adjustment thereof, without interest, in connection with subsequent contribution payments by him, or if such adjustment cannot be made, the commission shall refund said amount, without interest, from the fund. For like cause and within the same period, adjustment or refund may be so made on the commission's own initiative. In the event that this act is not certified by the social security board under section 1603 of the internal revenue code as amended, 1939, for any year, then and in that event, refunds shall be made of all contributions required under this act from employers for that year.

History: En. Subd. (d), Sec. 14, Ch. 137, L. 1937; amd. Sec. 5, Ch. 137, L. 1939; amd. Sec. 8, Ch. 164, L. 1941; amd. Sec. 3, Ch. 233, L. 1943. Taxation 535.
61 C.J. Taxation § 1254 et seq.

87-139. Lien for payment. If any contributions payable by an employer under this act, or any portion thereof, is not paid within sixty (60) days after the same becomes due, the commission may issue a certificate under its official seal, setting forth the amount of contributions due and interest accrued, directed to the sheriff of any county of the state, commanding him to levy upon and sell the real and personal property of the employer owing the same, found within his county, for the payment of the amount thereof, with the added penalties, interest and costs of executing the same and to return such certificates to the commission and pay to the commission the money collected by virtue thereof by a time to be therein specified, not more than ninety (90) days from the date of the certificate. The said sheriff shall, within five (5) days after the receipt of the certificate, file with the clerk of the district court of his county a copy thereof and thereupon the said clerk of the district court shall enter in the judgment docket, in the column for judgment debtors, the name of the employer mentioned in the certificate, and in the appropriate columns the amount of contributions due and the penalties for which the certificate is issued and the date when such copy is filed and thereupon the amount of such certificate so docketed shall become a lien upon the title to and interest in real property or chattels real of the employer against whom it is filed in the same manner as a judgment docketed in the office of such clerk. The said sheriff shall thereupon proceed upon the same in all respects, with like effect, and in the same manner prescribed by law in respect to executions issued against property upon judgment of a court of record, and shall be entitled to the same fees for his services in executing the certificate, to be collected in the same manner.

History: En. as Subd. (e) of Sec. 14, Ch. 137, L. 1937 by Sec. 8, Ch. 164, L. 1941.

Contributions from National Bank II-legal

Contributions attempted to be collected

from national bank for years during which state law made no provision for refund in event social security board approval not obtained, a condition to collecting contributions from governmental instrumentalities, were illegal and collection could be

enjoined although social security board First National Bank v. Bergan, ___ M ___,
had approved state law for years involved. 169 P 2d 233, 237.

87-140. Summary or jeopardy assessment. If any employer fails to file a report or return as required under this act, or the regulations of the commission adopted thereunder, within the time specified, the commission may make a summary or jeopardy assessment, of the amount due by making up such report and determining the amount of contributions due and owing to the fund upon the basis of such information as the commission may be able to obtain, and thereupon the same shall be collected the same as other reports and contributions due, with penalty and interest as provided in this act. Upon making such summary or jeopardy assessment, the commission shall immediately notify the employer in writing by personal service or by registered mail in the usual course, at the last known principal place of business operated by the said employer. Such assessment shall be final unless the employer shall protest such assessment in writing within fifteen (15) days after service of the notice, or within the same period of time the said employer shall file a correct, signed and sworn report and statement as provided by the act and the regulations of the commission. Upon written protest being filed as above set forth, a day certain for the hearing thereof shall be fixed by the commission and notice thereof mailed to the employer. At such hearing, the facts ascertained by the commission shall be conclusive and the commission may upon the basis of such facts ascertained assess the amount due, modify, set aside or revise the prior assessment and require the employer to pay the amount due with penalty and interest as provided for in this act. A copy of the decision of the commission and the assessment of the amount due shall be mailed to the employer at his last known principal place of business and thereupon become final.

History: En. Subd. (f), Sec. 3, Ch. 233,
L. 1943.

References

First National Bank v. Bergan, ___ M ___,
169 P 2d 233, 234.

87-141. Protection of rights and benefits—waiver of rights void. Any agreement by an individual to waive, release or commute his rights to benefits or any other rights under this act shall be void. Any agreement by any individual in the employ of any person or concern to pay all or any portion of an employer's contributions, required under this act from such employer, shall be void. No employer shall directly or indirectly make or require or accept any deduction from wages to finance the employer's contributions required from him, or require or accept any waiver of any right hereunder by an individual in his employ. Any employer or officer or agent of an employer who violates any provision of this section shall, for each offense, be fined not more than one thousand (\$1,000.00) dollars or be imprisoned for not more than six (6) months, or both.

History: En. Subd. (a), Sec. 15, Ch. 137, L. 1937; amd. Sec. 9, Ch. 164, L. 1941.

Master and Servant 78; Taxation 59.

39 C.J. Master and Servant § 362 et seq.;
61 C.J. Taxation § 123 et seq.

87-142. Limitation of fees. No individual claiming benefits shall be charged fees of any kind in any proceeding under this act by the commission or its representatives or by any court or any officer thereof. Any individual

claiming benefits in any proceeding before the chairman of an appeal tribunal or the commission or its representatives or a court may be represented by counsel or other duly authorized agent; but no such counsel or agents shall either charge or receive for such services more than an amount approved by the commission. Any person who violates any provision of this section shall, for each such offense, be fined not more than five hundred (\$500.00) dollars, or imprisoned for not more than six (6) months, or both.

History: En. Subd. (b), Sec. 15, Ch. 137, L. 1937; amd. Sec. 9, Ch. 164, L. 1941.

87-143. No assignment of benefits—exemptions. Any assignment, pledge, or encumbrance of any right to benefits which are or may become due or payable under this act shall be void; and such rights to benefits shall be exempt from levy, execution, attachment, or any other remedy whatsoever provided for the collection of debt; and benefits received by any individual, so long as they are not mingled with other funds of the recipient, shall be exempt from any remedy whatsoever for the collection of all debts except debts incurred for necessities furnished to such individual or his spouse, or dependents during the time when such individual was unemployed. Any waiver of any exemption provided for in this section shall be void.

History: En. Subd. (c), Sec. 15, Ch. 137, L. 1937; amd. Sec. 9, Ch. 164, L. 1941. Assignments—10; Exemptions—37.
6 C.J.S. Assignments §§ 15-17; 35 C.J.S. Exemptions §§ 26, 31, 43, 51, 57.

87-144. Protection of rights and benefits. Any individual who is inducted or enlisted in the armed forces of the United States, shall not be considered as unemployed for the purposes of this act. Wage records accumulated by an individual who is inducted or enlisted in the armed forces of the United States, shall be maintained intact by the commission during the period of time such individual is in the service and for ninety (90) days thereafter. The "base period" for benefit purposes of such individual shall be fixed and determined as of the date of such enlistment or induction into service. The wage records of such individuals shall thereupon be segregated by the commission and be maintained until the ending of such military service by the individual. Upon completing the period of service in the armed forces or discharge therefrom and upon fulfilling the eligibility requirements of section 87-105 (a), (b), (c) and (d), the said individual shall be entitled to benefits under this act provided the wage credits earned by such individual prior to military service are sufficient and within the "base period" as above set out to establish eligibility under section 87-105 (e). If by an act of congress or federal legislation unemployment compensation benefits or similar benefits should be established for individuals in service, the commission is hereby authorized and instructed to cooperate in such manner as may be deemed advisable and expedient in order to carry out the purpose of this act.

History: En. as Subd. (d) of Sec. 15, Ch. 137, L. 1937 by Sec. 9 (d), Ch. 164, L. 1941; amd. Sec. 4, Ch. 233, L. 1943.

87-145. Penalties—falsity or wilful nondisclosure—violations by employer or agent—violation of act by regulations—wrongfully collecting

benefits. (a) Whoever makes a false statement or representation knowing it to be false or knowingly fails to disclose a material fact, to obtain or increase any benefit or other payment under this act, either for himself or for any other person, shall be punished by a fine of not more than \$500 or by imprisonment for not longer than thirty days in the county jail or by both such fine and imprisonment; and each such false statement or representation or failure to disclose a material fact shall constitute a separate offense.

(b) Any employing unit or any officer or agent of an employing unit or any other person who makes a false statement or representation knowing it to be false, or who knowingly fails to disclose a material fact, to prevent or reduce the payment of benefits to any individual entitled thereto, or to avoid becoming or remaining subject hereto or to avoid or reduce any contribution or other payment required from an employing unit under this act, or who wilfully fails or refuses to make any such contributions or other payment or to furnish any reports required hereunder or to produce or permit the inspection or copying of records as required hereunder, shall be punished by a fine of not more than \$500 or by imprisonment for not longer than sixty days in the county jail or by both such fine and imprisonment; and each such false statement or representation or failure to disclose a material fact, and each day of such failure or refusal shall constitute a separate offense.

(c) Any person who shall wilfully violate any provision of this act or any order, rule or regulation thereunder, the violation of which is made unlawful or the observance of which is required under the terms of this act, and for which a penalty is neither prescribed herein nor provided by any other applicable statute, shall be punished by a fine of not more than \$500 or by imprisonment for not longer than sixty days in the county jail or by both such fine and imprisonment, and each day such violation continues shall be deemed to be a separate offense.

(d) Any person who, by reason of the nondisclosure or misrepresentation by him or by another, of a material fact (irrespective of whether such nondisclosure or misrepresentation was known or fraudulent) has received any sum as benefits under this act while any conditions for the receipt of benefits imposed by this act were not fulfilled in his case, or while he was disqualified from receiving benefits, shall, in the discretion of the commission, either be liable to have such sum deducted from any future benefits payable to him under this act or shall be liable to repay to the commission for the unemployment compensation fund, a sum equal to the amount so received by him, and such sum shall be collectible in the manner provided in this act for the collection of past due contributions.

History: En. Sec. 16, Ch. 137, L. 1937.

87-146. Representation in court. (a) In any civil action to enforce the provisions of this act the commission and the state may be represented by any qualified attorney who is employed by the commission and is designated by it for this purpose or at the commission's request, by the attorney general.

(b) All criminal actions for violation of any provision of this act, or of any rules or regulations issued pursuant thereto, shall be prosecuted by the attorney general of the state; or, at his request and under his direction,

by the prosecuting attorney of any county in which the employer has a place of business or the violator resides.

History: En. Sec. 17, Ch. 137, L. 1937.

87-147. Nonliability of state. Benefits shall be deemed to be due and payable under this act only to the extent provided in this act and to the extent that moneys are available therefor to the credit of the unemployment compensation fund, and neither the state nor the commission shall be liable for any amount in excess of such sums.

History: En. Sec. 18, Ch. 137, L. 1937.

87-148. Definitions. As used in this act, unless the context clearly requires otherwise:

(a) (1) "Annual payroll", means the total amount of wages paid by an employer (regardless of the time of payment) for employment during a calendar year.

(2) "Average annual payroll", means the average of the annual payrolls of an employer for the last three (3) or five (5) preceding calendar years, whichever average is higher.

(b) "Benefits", means the money payments payable to an individual, as provided in this act, with respect to his unemployment.

(c) "Base period", means the first four (4) of the last five (5) completed calendar quarters immediately preceding the first day of an individual's benefit year.

(d) "Benefit year", with respect to any individual means, the fifty-two (52) consecutive-week period beginning with the date of filing of a valid claim by said individual, and thereafter the fifty-two-consecutive-week period beginning with the date of the next valid claim filed after the termination of his last preceding benefit year.

(e) "Calendar quarter", means the period of three (3) consecutive calendar months ending on March 31, June 30, September 30, or December 31, excluding however, any calendar quarter or portion thereof which occurs prior to January 1, 1937, or the equivalent thereof as the commission may by regulation prescribe.

(f) "Commission", means the unemployment compensation commission established by this act.

(g) "Contributions", means the money payments to the state unemployment compensation fund required by this act.

(h) "Employing unit", means any individual or type of organization, including any partnership, association, trust, estate, joint-stock company, insurance company or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor thereof, or the legal representative of a deceased person, which has or subsequent to January 1, 1936, had in its employ one (1) or more individuals performing services for it within this state. All individuals performing services within this state for any employing unit which maintains two (2) or more separate establishments within this state shall be deemed to be employed by a single employing unit for all the purposes of this act. Each individual employed to perform or to assist in performing the work of any agent or employee of an employing unit shall be deemed to be employed by such employing unit for all the

purposes of this act, whether such individual was hired or paid directly by such employing unit or by such agent or employee, provided the employing unit had actual or constructive knowledge of the work.

(i) "Employer" means:

(1) Any employing unit which for some portion of a day in each of twenty (20) different weeks, whether or not such weeks are or were consecutive within either the current or the preceding calendar year, has or had in employment, one or more individuals (irrespective of whether the same individuals are or were employed in each such day); or whose total annual payroll within either the current or the preceding calendar year, exceeds the sum of five hundred (\$500.00) dollars;

(2) Any individual or employing unit which acquired the organization, trade or business, or substantially all the assets thereof, of another which at the time of such acquisition was an employer subject to this act;

(3) Any individual or employing unit which acquired the organization, trade or business, or substantially all the assets thereof, of another employing unit (not an employer subject to this act), and which, if subsequent to such acquisition it were treated as a single unit with such other employing unit would be an employer under paragraph (1) of this subsection;

(4) Any employing unit which, having become an employer under paragraph (1), (2) or (3) has not, under section 87-110, ceased to be an employer subject to this act; or

(5) For the effective period of its election pursuant to section 87-110 (c) any other employing unit which has elected to become fully subject to this act.

(j) (1) "Employment" subject to other provisions of this subsection means service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied.

(2) The term "employment" shall include an individual's entire service, performed within or both within and without this state if:

(A) The service is localized in this state; or

(B) The service is not localized in any state but some of the service is performed in this state and (I) the base of operations, or, if there is no base of operations, then the place from which such service is directed or controlled, is in this state; or (II) the base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this state.

(3) Service not covered under paragraph (2) of this subsection, and performed entirely without this state, with respect to no part of which contributions are required and paid under an unemployment compensation law of any other state or of the federal government, shall be deemed to be employment subject to this act if the individual performing such services is a resident of this state and the commission approves the election of the employing unit for whom such services are performed that the entire service of such individual shall be deemed to employment subject to this act.

(4) Service shall be deemed to be localized within a state if—

(A) The service is performed entirely within such state; or

(B) The service is performed both within and without such state, but the service performed without such state is incidental to the individual's

service within the state, for example, is temporary or transitory in nature or consists of isolated transactions.

(5) Services performed by an individual for wages shall be deemed to be employment subject to this act unless and until it is shown to the satisfaction of the commission that:

(A) Such individual has been and will continue to be free from control or direction over the performance of such services, both under his contract and in fact; and

(B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and

(C) Such individual is customarily engaged in an independently established trade, occupation, profession or business.

(6) The term "employment" shall not include:

(A) Agricultural labor;

(B) Domestic service in a private home, local college club or local chapter of a college fraternity or sorority;

(C) Service performed as an officer or member of the crew of a vessel on the navigable waters of the United States;

(D) Service performed by an individual in the employ of his son, daughter, or spouse, and service performed by a child under the age of twenty-one (21) in the employ of his father or mother;

(E) Service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, or wild life and anglers clubs or associations, no part of the net earnings of which inures to the benefit of any private shareholder or individual;

(F) Service performed in the employ of this state, or of any political subdivision thereof, or of any instrumentality of this state or its political subdivisions;

(G) Service performed in the employ of any other state or its political subdivisions, or of the United States government, or of an instrumentality of any other state or states or their political subdivisions or of the United States, except that national banks organized under the national banking law shall not be entitled to exemption under this section and shall be subject to this act the same as state banks;

(H) Service with respect to which unemployment compensation is payable under an unemployment compensation system established by an act of congress; provided, that the commission is hereby authorized and directed to enter into agreements with the proper agencies under such act of congress, which agreements shall become effective ten (10) days after publication thereof in the manner in section 87-121 for general rules, to provide reciprocal treatment to individuals who have, after acquiring potential rights to benefits under this act, acquired rights to unemployment compensation under such act of congress, or who have, after acquiring potential rights to unemployment compensation under such act of congress, acquired rights to benefits under this act;

(I) Services performed in the delivery and distribution of newspapers or shopping news from house to house and business establishments by an individual under the age of eighteen years, but not including the delivery or distribution to any point or points for subsequent delivery or distribution.

(k) "Employment office", means a free public employment office, or branch thereof, operated by this state or maintained as a part of a state-controlled system of public employment offices, or such other free public employment offices operated and maintained by the United States government or its instrumentalities, as the commission may approve.

(l) "Fund", means the unemployment compensation fund established by this act, to which all contributions required and from which all benefits provided under this act shall be paid.

(m) "State" includes, in addition to the states of the United States of America, Alaska, Hawaii, the District of Columbia, and the Dominion of Canada.

History: En. Subd. (a) to (m), Sec. 19, Ch. 137, L. 1937; amd. Sec. 6, Ch. 137, L. 1939; amd. Sec. 10, Ch. 164, L. 1941; amd. Sec. 5, Ch. 233, L. 1943.

References

First National Bank v. Bergan, ___ M ___, 169 P 2d 233, 234.

48 Am. Jur. 522-535, Social Security, Unemployment Insurance, and Retirement Funds, §§ 13-31.

Tests of independent contractor relationship in the field of social security acts. 134 ALR 1029.

Construction and application of provisions of social security or unemployment compensation acts relating to exemption of corporations or institutions of a religious, charitable, or educational character. 136 ALR 1467.

Insurance agents and solicitors of mutual benefit associations as within the coverage or exclusionary provisions of social security or unemployment compensation acts. 137 ALR 625.

Validity, construction and application of provisions of social security or unemployment compensation acts as to employment units which are affiliated or under a common control. 142 ALR 918.

Industrial homeworkers as within social security or unemployment compensation act. 143 ALR 418.

One who uses his own truck as an independent contractor or an employee of concern for which he transports goods, within social security or unemployment compensation act. 144 ALR 740.

State banks, insurance companies, or building and loan associations, which are members of Federal reserve banks or similar Federal agencies, or national banks, as within state social security or unemployment compensation act. 145 ALR 1074.

Construction and application of self-employment provisions of social security or unemployment compensation acts. 146 ALR 748.

What constitutes "agricultural labor" or "farm labor" within social security or unemployment compensation act. 146 ALR 1318.

Test of independent contractor relationship in the field of social security and unemployment compensation acts. 147 ALR 828.

What amounts to vendor-vendee or lessor-lessee relationship, as distinguished from employment or service relation, within social security or unemployment compensation acts. 152 ALR 520.

Construction and application of provision of social security or unemployment compensation acts relating to exemption of corporations or institutions of a religious, charitable or educational character. 155 ALR 369.

Musicians or other entertainers as employees of establishment in which they perform, within meaning of workmen's compensation, social security and unemployment insurance acts. 158 ALR 915.

Validity, construction, and application of provisions of social security or unemployment compensation acts as to employment units which are affiliated or under a common control. 158 ALR 1237.

Salesman on commission as within unemployment compensation or social security acts. 160 ALR 713.

Who is "member of a crew" within meaning of social security and unemployment compensation acts. 161 ALR 842.

What amounts to presence of foreign corporation in state, so as to render it liable to action therein to recover unemployment compensation tax. 161 ALR 1068.

87-149. Definitions—continued. (a) Total unemployment: (1) An individual shall be deemed "totally unemployed" in any week during which he performed no services and with respect to which no wages are payable to him.

(2) An individual's week of unemployment shall be deemed to commence only after his registration at an employment office, except as the commission may by regulation otherwise prescribe.

(3) As used in this subsection the term "wages" shall include only that part of remuneration for odd jobs or subsidiary work, or both, which is in excess of seven (\$7.00) dollars in any one week, and the term "services" shall not include that part of odd jobs or subsidiary work, or both, for which remuneration equal to or less than seven (\$7.00) dollars per week is payable, or for one (1) day's work not exceeding eight (8) hours, whichever is greater.

(b) "Unemployment compensation administration fund", means the unemployment compensation administration fund established by this act, from which administrative expenses under this act shall be paid.

(c) "Wages", means all remuneration payable for personal services, including commissions and bonuses and the cash value of all remuneration payable in any medium other than cash. The reasonable cash value of remuneration payable in any medium other than cash, shall be estimated and determined in accordance with rules prescribed by the commission. Commencing January 1, 1941, "wages", means all remuneration up to and including three thousand (\$3,000.00) dollars in a calendar year paid for personal services, including commissions and bonuses and the cash value of all remuneration paid in any medium other than cash. The reasonable cash value of all remuneration paid in any medium other than cash shall be estimated and determined in accordance with rules prescribed by the commission.

Wage records kept by the commission for the purposes of this act prior to January 1, 1941, shall be kept on the basis of wages payable, and wage records kept by the commission for the purposes of this act after January 1, 1941, shall be kept on the basis of wages paid.

Provided, however, that the term "wages" shall not include—

(1) The amount of any payment made to, or on behalf of, an employee by an employer on account of:

(A) Retirement, or

(B) Sickness or accident disability, or

(C) Medical and hospitalization expenses in connection with sickness or accident disability, or

(D) Death.

(E) Services performed for a fraternal benefit society, lodge, order, service club or association having a total annual pay roll of less than five hundred dollars (\$500.00) in any calendar year.

(d) "Week", means such period of seven (7) consecutive calendar days, as the commission may by regulations prescribe.

(e) "Weekly benefit amount". An individual's "weekly benefit amount", means the amount of benefits he would be entitled to receive for one (1) week of total unemployment.

History: En. Subd. (n) to (r), Sec. 19, Sec. 5, Ch. 233, L. 1943; amd. Sec. 6, Ch. 137, L. 1937; amd. Sec. 6, Ch. 137, L. 190, L. 1945.
1939; amd. Sec. 10, Ch. 164, L. 1941; amd.

87-150. Saving clause. The legislature reserves the right to amend or repeal all or any part of this act at any time; and there shall be no vested private right of any kind against such amendment or repeal. All the rights, privileges, or immunities conferred by this act or by acts done pursuant thereto shall exist subject to the power of the legislature to amend or repeal this act at any time.

History: En. Sec. 20, Ch. 137, L. 1937. Constitutional Law 92.
16 C.J.S. Constitutional Law §§ 215-217.

87-151. Act to be in effect. If Title III or Title IX of the "federal social security act" is declared unconstitutional, or in any way becomes inoperative, then this act shall terminate and cease and have no force and effect as of the date when said title or titles of said act is declared unconstitutional, or becomes inoperative.

History: En. Sec. 22, Ch. 137, L. 1937. Statutes 259.
59 C.J. Statutes § 688.

87-152. Approval by social security board. If the federal social security board shall fail to approve this act, the same shall immediately terminate and have no force and effect.

History: En. Sec. 23, Ch. 137, L. 1937.

TITLE 88

WAREHOUSES AND STORAGE

- Chapter 1. Uniform warehouse receipts act, 88-101 to 88-160.
2. Location of warehouses and elevators on railroad right-of-way, 88-201 to 88-207.
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CHAPTER 1

UNIFORM WAREHOUSE RECEIPTS ACT

- Section 88-101. Warehouseman may issue receipts.
88-102. Warehouse receipts—terms—liability for omission of terms.
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- 88-152. Penalty for warehouseman to issue duplicate negotiable receipt when original is outstanding without marking the same "duplicate."
- 88-153. Penalty for issuing negotiable receipt for goods of which warehouseman is owner.
- 88-154. Penalty for delivering goods against which negotiable receipt is outstanding without obtaining possession of same.
- 88-155. Penalty for negotiating receipt for deposited goods with defective title.
- 88-156. What laws applicable in cases where this act does not prescribe rule.
- 88-157. How act shall be interpreted and construed.
- 88-158. Definitions.
- 88-159. To what receipts act does not apply.
- 88-160. Act, how cited.

88-101. (4079) Warehouseman may issue receipts. Warehouse receipts may be issued by any warehouseman.

History: En. Sec. 1, Ch. 154, L. 1917; re-en. Sec. 4079, R. C. M. 1921.

NOTE.—Uniform state law.

Sections 88-101 through 88-160 constitute the "Uniform Warehouse Receipts Act" approved by the National Conference of Commissioners of Uniform State Laws and adopted in every state of the United States. It has also been adopted in Alaska, District of Columbia, Philippine Islands and Puerto Rico.

Cross-Reference

Fictitious receipts, penalty for issuance, sec. 94-35-111.

Warehousemen—13.

67 C.J. Warehousemen and Safe Depositaries § 31 et seq.

56 Am. Jur. 335, Warehouses, § 30.

Relationship of bailor and bailee as between owner of goods in bonded warehouse and proprietor of warehouse. 77 ALR 1502.

Legal effect of transaction by which grain or other commodity is received for storage by one who has not complied with statutory conditions necessary to become a public warehouseman. 108 ALR 928.

Statutory warehousing as determined by character of property stored. 132 ALR 532.

Validity as against third persons of sale or pledge of goods, or receipts issued for goods, retained in warehouse on premises of seller or pledgor (field warehousing). 133 ALR 209.

88-102. (4080) Warehouse receipts—terms—liability for omission of terms. Warehouse receipts need not be in any particular form, but every such receipt must embody within its written or printed terms:

- (a) The location of the warehouse where the goods are stored;
- (b) The date of issue of the receipt;
- (c) The consecutive number of the receipt;
- (d) A statement whether the goods received will be delivered to bearer, to a specified person, or to a specified person or his order;
- (e) The rate of storage charges;
- (f) A description of the goods or of the packages containing them;
- (g) The signature of the warehouseman, which may be made by his authorized agent;

(h) If the receipt is issued for goods of which the warehouseman is owner, either solely or jointly or in common with others, the fact of such ownership, and

(i) A statement of the amount of advances made and of liabilities incurred for which the warehouseman claims a lien. If the precise amount of such advances made or of such liabilities incurred is, at the time of the issue of the receipt, unknown to the warehouseman or to his agent who issues it, a statement of the fact that advances have been made or liabilities incurred and the purpose thereof is sufficient.

A warehouseman shall be liable to any person injured thereby, for all damages caused by the omission from a negotiable receipt of any of the terms herein required.

History: En. Sec. 2, Ch. 154, L. 1917;
re-en. Sec. 4080, R. C. M. 1921.

Provision in warehouseman's receipt limiting liability as applicable where warehouseman converts property. 99 ALR 266.

Warehousemen—12.

67 C.J. Warehousemen and Safe Depositaries § 32 et seq.

Storage contract as a bailment of chattels or lease of place where chattels are stored. 138 ALR 1137.

56 Am. Jur. 336, Warehouses, § 32.

Right of purchaser of warehouse receipt against warehousemen. 38 ALR 1205.

Validity and applicability of stipulation in warehouseman's receipt fixing valuation of property as basis of responsibility. 142 ALR 776.

"Warehouse purchase receipt" as bailment or contract of sale. 91 ALR 907.

88-103. (4081) Insertion of other conditions—effect. A warehouseman may insert in a receipt, issued by him, any other terms and conditions, provided that such terms and conditions shall not—

(a) Be contrary to the provisions of this act;

(b) In any wise impair his obligation to exercise that degree of care in safekeeping of the goods entrusted to him which a reasonably careful man would exercise in regard to similar goods of his own.

History: En. Sec. 3, Ch. 154, L. 1917;
re-en. Sec. 4081, R. C. M. 1921.

Necessity of bringing to bailor's attention provision in warehouse receipt limiting liability of warehouseman. 160 ALR 1112.

88-104. (4082) Non-negotiable receipt—definition. A receipt in which it is stated that the goods received will be delivered to the depositor, or to any other specified person, is a non-negotiable receipt.

History: En. Sec. 4, Ch. 154, L. 1917;
re-en. Sec. 4082, R. C. M. 1921.

56 Am. Jur. 343; Warehouses, §§ 45 et seq.

88-105. (4083) Negotiable receipt—definition. A receipt in which it is stated that the goods received will be delivered to the bearer, or to the order of any person named in such receipt is a negotiable receipt.

No provisions shall be inserted in a negotiable receipt that is non-negotiable. Such provisions, if inserted, shall be void.

History: En. Sec. 5, Ch. 154, L. 1917;
re-en. Sec. 4083, R. C. M. 1921.

56 Am. Jur. 343, Warehouses, § 45 et seq.

88-106. (4084) Duplicate receipts, how marked—liability for failure to mark. When more than one negotiable receipt is issued for the same goods, the word "duplicate" shall be plainly placed upon the face of every such receipt, except the one first issued. A warehouseman shall be liable for all damage caused by his failure so to do to any one who purchased the

subsequent receipt for value supposing it to be an original, even though the purchase be after the delivery of the goods by the warehouseman to the holder of the original receipt.

History: En. Sec. 6, Ch. 154, L. 1917;
re-en. Sec. 4084, R. C. M. 1921.

Cross-Reference

Duplicate receipts to be marked, penalty,
sec. 94-35-113.

88-107. (4085) Non-negotiable receipts, how marked—option of holder when not properly designated. A non-negotiable receipt shall have plainly placed upon its face by the warehouseman issuing it “non-negotiable,” or “not negotiable.” In case of the warehouseman’s failure so to do, a holder of the receipt who purchased it for value supposing it to be negotiable, may, at his option, treat such receipt as imposing upon the warehouseman the same liabilities he would have incurred had the receipt been negotiable.

This section shall not apply, however, to letters, memoranda, or written acknowledgments of an informal character.

History: En. Sec. 7, Ch. 154, L. 1917;
re-en. Sec. 4085, R. C. M. 1921.

Warehousemen—13.

67 C.J. Warehousemen and Safe Depos-
itaries § 38 et seq.

88-108. (4086) Delivery of goods upon demand. A warehouseman, in the absence of some lawful excuse provided by this act, is bound to deliver the goods upon a demand made either by the holder of a receipt for the goods or by the depositor, if such demand is accompanied with—

- (a) An offer to satisfy the warehouseman’s lien;
- (b) An offer to surrender the receipt if negotiable with such indorsements as would be necessary for the negotiation of the receipt, and
- (c) A readiness and willingness to sign, when the goods are delivered, an acknowledgment that they have been delivered, if such signature is requested by the warehouseman.

In case the warehouseman refuses or fails to deliver the goods in compliance with a demand by the holder or depositor so accompanied, the burden shall be upon the warehouseman to establish the existence of a lawful excuse for such refusal.

History: En. Sec. 8, Ch. 154, L. 1917;
re-en. Sec. 4086, R. C. M. 1921.

Delivery by warehouseman of property
to impostor. 54 ALR 1335.

Warehousemen—25 (34).

67 C.J. Warehousemen and Safe Depos-
itaries § 138 et seq.

Warehouseman’s bond as covering ware-
house receipts issued by warehouse to it-
self or for its own property. 61 ALR 331.

88-109. (4087) To whom goods may be delivered. A warehouseman is justified in delivering the goods, subject to the provisions of the three following sections, to one who is—

- (a) The person lawfully entitled to the possession of the goods, or his agent;
- (b) A person who is either himself entitled to delivery by the terms of a non-negotiable receipt issued for the goods, or who has written authority from the person so entitled either indorsed upon the receipt or written upon another paper, or
- (c) A person in possession of a negotiable receipt by the terms of which the goods are deliverable to him or order or to bearer, or which has been indorsed to him or in blank by the person to whom delivery was

promised by the terms of the receipt or by his mediate or immediate endorsee.

History: En. Sec. 9, Ch. 154, L. 1917;
re-en. Sec. 4087, R. C. M. 1921.

67 C.J. Warehousemen and Safe Depositors § 138 et seq.

Warehousemen 25 (1, 4).

56 Am. Jur. 405, Warehouses, §§ 183 et seq.

88-110. (4088) Warehouseman when liable for conversion. Where a warehouseman delivers the goods to one who is not in fact lawfully entitled to the possession of them, the warehouseman shall be liable as for conversion to all having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subdivisions (b) and (c) of the preceding section and though he delivered the goods as authorized by said subdivisions he shall be so liable, if prior to such delivery he had either—

(a) Been requested, by or on behalf of the person lawfully entitled to a right of property or possession in the goods, not to make such delivery, or

(b) Had information that the delivery about to be made was to one not lawfully entitled to the possession of the goods.

History: En. Sec. 10, Ch. 154, L. 1917;
re-en. Sec. 4088, R. C. M. 1921.

67 C.J. Warehousemen and Safe Depositors § 138 et seq.

Warehousemen 25(5).

56 Am. Jur. 405, Warehouses, §§ 183 et seq.

88-111. (4089) Liability of warehouseman for failure to take up negotiable receipt. Except as provided in section 88-136, where a warehouseman delivers goods for which he had issued a negotiable receipt, the negotiation of which would transfer the right to the possession of the goods, and fails to take up and cancel the receipt, he shall be liable to any one who purchases for value in good faith such receipt, for failure to deliver the goods to him, whether such purchaser acquired title to the receipt before or after the delivery of the goods by the warehouseman.

History: En. Sec. 11, Ch. 154, L. 1917;
re-en. Sec. 4089, R. C. M. 1921.

56 Am. Jur. 410, Warehouses, §§ 193 et seq.

Warehousemen 17.

67 C.J. Warehousemen and Safe Depositors § 60 et seq.

Duty of warehouseman to take up and cancel negotiable receipt upon delivering goods as delegable or non-delegable. 139 ALR 1488.

88-112. (4090) Same—liability when portion of goods delivered. Except as provided in section 88-136, where a warehouseman delivers part of the goods for which he had issued a negotiable receipt and fails either to take up and cancel such receipt, or to place plainly upon it a statement of what goods or packages have been delivered he shall be liable, to any one who purchases for value in good faith such receipt, for failure to deliver all the goods specified in the receipt, whether such purchaser acquired title to the receipt before or after the delivery of any portion of the goods by the warehouseman.

History: En. Sec. 12, Ch. 154, L. 1917;
re-en. Sec. 4090, R. C. M. 1921.

88-113. (4091) Alteration of receipt—when not an excuse from liability. The alteration of a receipt shall not excuse the warehouseman who issued it from any liability if such alteration was—

(a) Immaterial;

- (b) Authorized, or
- (c) Made with fraudulent intent.

If the alteration was authorized, the warehouseman shall be liable according to the terms of the receipt as altered. If the alteration was unauthorized, but made without fraudulent intent, the warehouseman shall be liable according to the terms of the receipt, as they were before alteration.

Material and fraudulent alteration of a receipt shall not excuse the warehouseman who issued it from liability to deliver, according to the terms of the receipt as originally issued, the goods for which it was issued, but shall excuse him from any other liability to the person who made the alteration and to any person who took with notice of the alteration. Any purchaser of the receipt for value without notice of the alteration shall acquire the same rights against the warehouseman which such purchaser would have acquired if the receipt had not been altered at the time of the purchase.

History: En. Sec. 13, Ch. 154, L. 1917;
re-en. Sec. 4091, R. C. M. 1921.

Alteration of Instruments 20.
3 C.J.S. Alteration of Instruments § 6.
56 Am. Jur. 338, Warehouses, § 36.

88-114. (4092) Court may order delivery when receipt has been lost or destroyed—bond and costs. Where a negotiable receipt has been lost or destroyed, a court of competent jurisdiction may order the delivery of the goods upon satisfactory proof of such loss or destruction and upon the giving of a bond with sufficient sureties to be approved by the court to protect the warehouseman from any liability or expense, which he or any person injured by such delivery may incur by reason of the original receipt remaining outstanding. The court may also, in its discretion, order the payment of the warehouseman's reasonable costs and counsel fees. The delivery of the goods under an order of the court as provided in this section, shall not relieve the warehouseman from liability to a person to whom the negotiable receipt has been or shall be negotiated for value without notice of the proceedings or of the delivery of the goods.

History: En. Sec. 14, Ch. 154, L. 1917;
re-en. Sec. 4092, R. C. M. 1921.

67 C.J. Warehousemen and Safe Depositories § 138 et seq.
56 Am. Jur. 411, Warehouses, § 198.

Warehousemen 25(1).

88-115. (4093) Duplicate receipt—warranty of what. A receipt upon the face of which the word "duplicate" is plainly placed is a representation and warranty by the warehouseman that such receipt is an accurate copy of an original receipt properly issued and uncanceled at the date of the issue of the duplicate, but shall impose upon him no other liability.

History: En. Sec. 15, Ch. 154, L. 1917;
re-en. Sec. 4093, R. C. M. 1921.

88-116. (4094) Delivery of goods by warehouseman—when excused by title or right of possession. No title or right to the possession of the goods, on the part of the warehouseman, unless such title or right is derived directly or indirectly from a transfer made by the depositor at the time of or subsequent to the deposit for storage, or from the warehouseman's lien, shall excuse the warehouseman from liability for refusing to deliver the goods according to the terms of the receipt.

History: En. Sec. 16, Ch. 154, L. 1917;
re-en. Sec. 4094, R. C. M. 1921.

Warehousemen 25(8).
67 C.J. Warehousemen and Safe Depos-
itaries § 138 et seq.

88-117. (4095) Procedure on suit when goods are claimed by more than one person. If more than one person claims the title or possession of the goods, the warehouseman may, either as a defense to an action brought against him for non-delivery of the goods, or as an original suit, whichever is appropriate, require all known claimants to interplead.

History: En. Sec. 17, Ch. 154, L. 1917;
re-en. Sec. 4095, R. C. M. 1921.

Bammel et al., 106 M 407, 415, 81 P 2d 673.

Affirmative Relief on All Issues

Elevator company seeking interpleader of various parties under this section, and not under general interpleader statute sec. 93-2825, to determine ownership of quantity of grain held in storage, did not defeat its right to maintain suit by way of payment on storage charges and cancellation of storage tickets erroneously issued to the grower by way of affirmative relief, as this section contemplates that all issues between the parties should be settled. Rocky Mountain Elevator Co. v. Bammel et al., 106 M 407, 413, 81 P 2d 673.

Allowance of Costs to Plaintiff

Held, that the trial court in ordering that the elevator company in an action in interpleader under this section, not responsible for the litigation, should be awarded its costs of suit and that each of the defendants should pay his own costs, properly exercised its discretion under sec. 93-8604. Rocky Mountain Elevator Co. v.

Marshaling of Assets, When Party May Not Complain

Where vendor of farm lands, in an action in interpleader by the elevator company under this section, was awarded the amount claimed by him, he was in no position to urge on appeal that the district court erred in not ordering a marshaling of the purchaser's assets because purchaser was indebted to another defendant under a mortgage when such defendant was not complaining. After vendor received all he was entitled to, he was no longer interested in what disposition the purchaser made of his share of the grain. Rocky Mountain Elevator Co. v. Bammel et al., 106 M 407, 415, 81 P 2d 673.

Interpleader 11.

48 C.J.S. Interpleader § 17.

Warehousemen's right to interplead rival claimants to goods stored or their proceeds. 100 ALR 425.

88-118. (4096) When warehouseman may retain goods in case of adverse claim. If some one other than the depositor or person claiming under him has a claim to the title or possession of the goods, and the warehouseman has information of such claim, the warehouseman shall be excused from liability for refusing to deliver the goods, either to the depositor or person claiming under him or to the adverse claimant, until the warehouseman has had a reasonable time to ascertain the validity of the adverse claim or to bring legal proceedings to compel all claimants to interplead.

History: En. Sec. 18, Ch. 154, L. 1917;
re-en. Sec. 4096, R. C. M. 1921.

References

Rocky Mountain Elevator Co. v. Bammel et al., 106 M 407, 413, 81 P 2d 673.

88-119. (4097) Claim of third person not a defense to action for failure to deliver. Except as provided in the two preceding sections and in sections 88-109 and 88-136, no right or title of a third person shall be a defense to an action brought by the depositor or person claiming under him against the warehouseman for failure to deliver the goods according to the terms of the receipt.

History: En. Sec. 19, Ch. 154, L. 1917;
re-en. Sec. 4097, R. C. M. 1921.

88-120. (4098) Liability of warehouseman for nonexistence of goods or failure to correspond to description. A warehouseman shall be liable to the

holder of a receipt for damages caused by the nonexistence of the goods or by failure of the goods to correspond with the description thereof in the receipt at the time of its issue. If, however, the goods are described in a receipt merely by a statement of marks or labels upon them, or upon packages containing them, or by a statement that the goods are said to be goods of a certain kind, or that the packages containing the goods are said to contain goods of a certain kind, or by words of like purport, such statements, if true, shall not make liable the warehouseman issuing the receipt, although the goods are not of the kind which the marks or labels upon them indicate, or of the kind they were said to be by the depositor.

History: En. Sec. 20, Ch. 154, L. 1917;
re-en. Sec. 4098, R. C. M. 1921.

67 C.J. Warehousemen and Safe Depositors § 83.

56 Am. Jur. 337, Warehouses, § 34.

Warehousemen⇒24(2).

88-121. (4099) Liability for want of care. A warehouseman shall be liable for any loss or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful owner of similar goods would exercise, but he shall not be liable, in the absence of an agreement to the contrary, for any loss or injury to the goods which could not have been avoided by the exercise of such care.

History: En. Sec. 21, Ch. 154, L. 1917;
re-en. Sec. 4099, R. C. M. 1921.

Liability of warehouseman for damage to, or destruction of, property by fire. 16 ALR 280.

56 Am. Jur. 378, Warehouses, §§ 126 et seq.

Liability of warehouseman for theft of property in his care. 26 ALR 256.

Liability of bailee for loss of or injury to goods kept at a place other than that originally intended. 12 ALR 1322.

Liability of warehouseman for deterioration of goods due to improper temperature. 55 ALR 1103.

88-122. (4100) Goods to be kept separately to permit identification. Except as provided in the following section, a warehouseman shall keep the goods so far separate from goods of other depositors, and from other goods of the same depositor for which a separate receipt has been issued, as to permit at all times the identification and redelivery of the goods deposited.

History: En. Sec. 22, Ch. 154, L. 1917;
re-en. Sec. 4100, R. C. M. 1921.

56 Am. Jur. 396, Warehouses, §§ 164 et seq.

Warehousemen⇒20.

67 C.J. Warehousemen and Safe Depositors § 21 et seq.

Statutory warehousing as determined by character of property stored. 132 ALR 532.

88-123. (4101) When interchangeable goods may be commingled. If authorized by agreement or by custom, a warehouseman may mingle fungible goods with other goods the same kind and grade. In such case the various depositors of the mingled goods shall own the entire mass in common and each depositor shall be entitled to such portion thereof as the amount deposited by him bears to the whole.

History: En. Sec. 23, Ch. 154, L. 1917;
re-en. Sec. 4101, R. C. M. 1921.

Deposit of grain without obligation to return identical grain as a bailment or a sale. 54 ALR 1166.

56 Am. Jur. 334, Warehouses, § 28.

88-124. (4102) Liability of warehouseman to depositors of commingled goods. The warehouseman shall be severally liable to each depositor for

the care and redelivery of his share of such mass to the same extent and under the same circumstances as if the goods had been kept separate.

History: En. Sec. 24, Ch. 154, L. 1917;
re-en. Sec. 4102, R. C. M. 1921.

88-125. (4103) When goods cannot be attached or levied on in warehouseman's possession—surrender of receipt. If goods are delivered to a warehouseman by the owner or by a person whose act in conveying the title to them to a purchaser in good faith for value would bind the owner, and a negotiable receipt is issued for them, they cannot thereafter, while in the possession of the warehouseman, be attached by garnishment or otherwise, or be levied upon by an execution, unless the receipt be first surrendered to the warehouseman, or its negotiation enjoined. The warehouseman shall in no case be compelled to deliver up the actual possession of the goods until the receipt is surrendered to him or impounded by the court.

History: En. Sec. 25, Ch. 154, L. 1917; Attachment or garnishment of goods
re-en. Sec. 4103, R. C. M. 1921. covered by negotiable warehouse receipt.
40 ALR 969.

88-126. (4104) Remedies of creditors. A creditor whose debtor is the owner of a negotiable receipt shall be entitled to such aid from courts of appropriate jurisdiction, by injunction and otherwise, in attaching such receipt or in satisfying the claim by means thereof as is allowed at law or in equity, in regard to property which cannot readily be attached or levied upon by ordinary legal process.

History: En. Sec. 26, Ch. 154, L. 1917; 7 C.J.S. Attachment § 501.
re-en. Sec. 4104, R. C. M. 1921. 56 Am. Jur. 366, Warehouses, §§ 95 et
seq.

Attachment 224.

88-127. (4105) Warehouseman's lien. Subject to the provisions of section 88-130, a warehouseman shall have a lien on goods deposited or on the proceeds thereof in his hands, for all lawful charges for storage and preservation of the goods; also for all lawful claims for money advanced, interest, insurance, transportation, labor, weighing, coopering, and other charges and expenses in relation to such goods; also for all reasonable charges and the expenses for notice, and advertisements of sale, and for sale of the goods where default has been made in satisfying the warehouseman's lien.

History: En. Sec. 27, Ch. 154, L. 1917; 56 Am. Jur. 371, Warehouses, §§ 107, 108.
re-en. Sec. 4105, R. C. M. 1921. Warehouseman's lien on property stored
by officer who had seized it under attachment or execution. 95 ALR 1529.

Warehousemen 30-32.
67 C.J. Warehousemen and Safe Depositaries § 199 et seq.

88-128. (4106) Enforcement of warehouseman's lien. Subject to the provisions of section 88-130, a warehouseman's lien may be enforced—

(a) Against all goods, whenever deposited, belonging to the person who is liable as debtor for the claims in regard to which lien is asserted, and

(b) Against all goods belonging to others which have been deposited at any time by the person who is liable as debtor for the claims in regard to which the lien is asserted if such person has been so entrusted with the possession of the goods that a pledge of the same by him at the time of the

deposit to one who took the goods in good faith for value would have been valid.

History: En. Sec. 28, Ch. 154, L. 1917;
re-en. Sec. 4106, R. C. M. 1921.

67 C.J. Warehousemen and Safe Depositories § 229 et seq.

56 Am. Jur. 371, Warehouses, § 106.

Warehousemen—33.

88-129. (4107) How lien is lost. A warehouseman loses his lien upon goods—

(a) By surrendering possession thereof, or

(b) By refusing to deliver the goods when a demand is made with which he is bound to comply under the provisions of this act.

History: En. Sec. 29, Ch. 154, L. 1917;
re-en. Sec. 4107, R. C. M. 1921.

56 Am. Jur. 372, Warehouses, § 109.

88-130. (4108) Lien in case negotiable receipt is issued. If a negotiable receipt is issued for goods, the warehouseman shall have no lien thereon, except for charges for storage of those goods subsequent to the date of the receipt, unless the receipt expressly enumerate other charges for which a lien is claimed. In such case there shall be a lien for the charges enumerated so far as they are within the terms of section 88-127, although the amount of the charges so enumerated is not stated in the receipt.

History: En. Sec. 30, Ch. 154, L. 1917;
re-en. Sec. 4108, R. C. M. 1921.

88-131. (4109) Warehouseman may refuse delivery until lien is satisfied. A warehouseman having a lien valid against the person demanding the goods may refuse to deliver the goods to him until the lien is satisfied.

History: En. Sec. 31, Ch. 154, L. 1917;
re-en. Sec. 4109, R. C. M. 1921.

88-132. (4110) Warehouseman entitled to charges and advances in all cases. Whether a warehouseman has or has not a lien upon the goods, he is entitled to all remedies allowed by law to a creditor against his debtor, for the collection from the depositor of all charges and advances which the depositor has expressly or impliedly contracted with the warehouseman to pay.

History: En. Sec. 32, Ch. 154, L. 1917;
re-en. Sec. 4110, R. C. M. 1921.

67 C.J. Warehousemen and Safe Depositories § 229 et seq.

56 Am. Jur. 373, Warehouses, §§ 110 et seq.

Warehousemen—33.

88-133. (4111) Satisfaction of warehouseman's lien—advertisement and sale of goods and disposition of proceeds. A warehouseman's lien for a claim which has become due may be satisfied as follows:

The warehouseman shall give written notice to the person on whose account the goods are held, and to any other person known by the warehouseman to claim an interest in the goods. Such notice shall be given by delivery in person or by registered letter addressed to the last known place of business or abode of the person to be notified. The notice shall contain—

(a) An itemized account of the warehouseman's claim, showing the sum due at the time of the notice and the date or dates when it became due;

(b) A brief description of the goods against which the lien exists;

(c) A demand that the amount of the claim as stated in the notice, and of such further claim as shall accrue, shall be paid on or before a day mentioned, not less than ten days from the delivery of the notice if it is personally delivered, or from the time when the notice should reach its destination, according to the due course of post, if the notice is sent by mail, and

(d) A statement that unless the claim is paid within the time specified the goods will be advertised for sale and sold by auction at a specified time and place.

In accordance with the terms of a notice so given, a sale of the goods by auction may be had to satisfy any valid claim of the warehouseman for which he has a lien on the goods. The sale shall be had in the place where the lien was acquired, or, if such place is manifestly unsuitable for the purpose, at the nearest suitable place. After the time for the payment of the claim specified in the notice to the depositor has elapsed, an advertisement of the sale, describing the goods to be sold, and stating the name of the owner or person on whose account the goods are held, and the time and place of the sale, shall be published once a week for two consecutive weeks in a newspaper published in the place where such sale is to be held. The sale shall not be held less than fifteen days from the time of the first publication. If there is no newspaper published in such place, the advertisement shall be posted at least ten days before such sale in not less than six conspicuous places therein.

From the proceeds of such sale the warehouseman shall satisfy his lien, including the reasonable charges of notice, advertisement, and sale. The balance, if any, of such proceeds shall be held by the warehouseman, and delivered on demand to the person to whom he would have been bound to deliver or justified in delivering the goods.

At any time before the goods are so sold any person claiming a right of property or possession therein may pay the warehouseman the amount necessary to satisfy his lien and to pay the reasonable expenses and liabilities incurred in serving notices and advertising and preparing for the sale up to the time of such payment. The warehouseman shall deliver goods to the person making such payment if he is a person entitled, under the provisions of this act, to the possession of the goods on payment of charges thereon. Otherwise the warehouseman shall retain possession of the goods according to the terms of the original contract of deposit.

History: En. Sec. 33, Ch. 154, L. 1917;
re-en. Sec. 4111, R. C. M. 1921.

56 Am. Jur. 373, Warehouses, § 111.

Liability of warehouseman, and of surety on bond, in respect of collection and remittance of proceeds of sale of merchandise. 121 ALR 1155.

88-134. (4112) Notice to pay charges and remove perishable and other goods—sale and disposition. If goods are of a perishable nature, or by keeping will deteriorate greatly in value, or by their odor, leakage, inflammability, or explosive nature, will be liable to injure other property, the warehouseman may give such notice to the owner, or to the person in whose name the goods are stored, as is reasonable and possible under the circumstances, to satisfy the lien upon such goods, and to remove them from the warehouse, and in the event of the failure of such person to satisfy the lien and to remove the goods within the time specified, the warehouseman

may sell the goods at public or private sale without advertising. If the warehouseman, after a reasonable effort is unable to sell such goods, he may dispose of them in any lawful manner, and shall incur no liability by reason thereof.

The proceeds of any sale made under the terms of this section shall be disposed of in the same way as the proceeds of sales made under the terms of the preceding section.

History: En. Sec. 34, Ch. 154, L. 1917;
re-en. Sec. 4112, R. C. M. 1921.

67 C.J. Warehousemen and Safe Depositors § 85.

56 Am. Jur. 382, Warehouses, § 132.

Warehousemen \Rightarrow 24(1).

88-135. (4113) Remedy for enforcing lien not exclusive. The remedy for enforcing a lien herein provided does not preclude any other remedies allowed by law for the enforcement of a lien against personal property nor bar the right to recover so much of the warehouseman's claim as shall not be paid by the proceeds of the sale of the property.

History: En. Sec. 35, Ch. 154, L. 1917;
re-en. Sec. 4113, R. C. M. 1921.

88-136. (4114) Liability of warehouseman after goods have been sold to satisfy lien. After goods have been lawfully sold to satisfy a warehouseman's lien, or have been lawfully sold or disposed of because of their perishable or hazardous nature, the warehouseman shall not thereafter be liable for failure to deliver the goods to the depositor, or owner of the goods, or to a holder of the receipt given for the goods when they were deposited, even if such receipt be negotiable.

History: En. Sec. 36, Ch. 154, L. 1917;
re-en. Sec. 4114, R. C. M. 1921.

88-137. (4115) Negotiation of receipts—by delivery—when receipt is indorsed. A negotiable receipt may be negotiated by delivery—

(a) Where, by the terms of the receipt, the warehouseman undertakes to deliver the goods to the bearer, or

(b) Where, by the terms of the receipt, the warehouseman undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the receipt has indorsed it in blank or to bearer.

Where, by the terms of a negotiable receipt, the goods are deliverable to bearer, or where a negotiable receipt has been indorsed in blank or to bearer, any holder may indorse the same to himself or to any other specified person, and in such case the receipt shall thereafter be negotiated only by the indorsement of such indorsee.

History: En. Sec. 37, Ch. 154, L. 1917;
re-en. Sec. 4115, R. C. M. 1921.

67 C.J. Warehousemen and Safe Depositors § 50 et seq.

56 Am. Jur. 345, Warehouses, §§ 50 et seq.

Warehousemen \Rightarrow 15(1).

88-138. (4116) Negotiation by indorsement. A negotiable receipt may be negotiated by the indorsement of the person to whose order the goods are, by the terms of the receipt deliverable. Such indorsement may be in blank, to bearer or to a specified person. If indorsed to a specified person, it may be again negotiated by the indorsement of such person in blank, to bearer

or to another specified person. Subsequent negotiation may be made in like manner.

History: En. Sec. 38, Ch. 154, L. 1917;
re-en. Sec. 4116, R. C. M. 1921.

Lack of indorsement or irregular indorsement of warehouse receipt as affecting pledge of goods. 18 ALR 588.

88-139. (4117) Transfer of non-negotiable receipts. A receipt which is not in such form that it can be negotiated by delivery may be transferred by the holder by delivery to a purchaser or donee.

A non-negotiable receipt cannot be negotiated, and the indorsement of such receipt gives the transferee no additional right.

History: En. Sec. 39, Ch. 154, L. 1917;
re-en. Sec. 4117, R. C. M. 1921.

88-140. (4118) Who may negotiate a receipt. A negotiable receipt may be negotiated—

(a) By the owner thereof, or

(b) By any person to whom the possession or custody of the receipt has been intrusted by the owner, if, by the terms of the receipt, the warehouseman undertakes to deliver the goods to the order of the person to whom the possession or custody of the receipt has been entrusted, or if at the time of such intrusting the receipt is in such form that it may be negotiated by delivery.

History: En. Sec. 40, Ch. 154, L. 1917;
re-en. Sec. 4118, R. C. M. 1921.

88-141. (4119) Rights of transferee when receipt has been negotiated. A person to whom a negotiable receipt has been duly negotiated acquires thereby—

(a) Such title to the goods as the person negotiating the receipt to him had or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the depositor or person to whose order the goods were to be delivered by the terms of the receipt had or had ability to convey to a purchaser in good faith for value, and

(b) The direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt as fully as if the warehouseman had contracted directly with him.

History: En. Sec. 41, Ch. 154, L. 1917;
re-en. Sec. 4119, R. C. M. 1921.

affecting liens on the property represented by the receipts. 61 ALR 949.

Warehousemen—16.

67 C.J. Warehousemen and Safe Depositaries § 60 et seq.

56 Am. Jur. 347, Warehouses, §§ 54 et seq.

Uniform Warehouse Receipts Act as

Estoppel of owner of tangible personal property who knowingly or voluntarily permits another to have possession of warehouse receipts, indorsed in blank or otherwise showing ownership in possessor, to deny latter's authority to sell, mortgage, pledge, or otherwise deal with, the property. 151 ALR 696.

88-142. (4120) Rights of transferee when receipt has not been negotiated—notice to warehouseman—when and how rights may be defeated. A person to whom a receipt has been transferred but not negotiated, acquires thereby, as against the transferor, the title of the goods, subject to the terms of any agreement with the transferor.

If the receipt is non-negotiable such person also acquires the right to notify the warehouseman of the transfer to him of such receipt, and there-

by to acquire the direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt.

Prior to the notification of the warehouseman by the transferor or transferee of a non-negotiable receipt, the title of the transferee to the goods and the right to acquire the obligation of the warehouseman may be defeated by the levy of an attachment or execution upon the goods by a creditor of the transferor, or by a notification to the warehouseman by the transferor or by a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor.

History: En. Sec. 42, Ch. 154, L. 1917;
re-en. Sec. 4120, R. C. M. 1921.

Uniform Warehouse Receipts Act as
affecting liens on the property represented
by the receipts. 61 ALR 949.

88-143. (4121) When transferee of negotiable receipt may enforce indorsement. Where a negotiable receipt is transferred for value by delivery, and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the receipt, unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made.

History: En. Sec. 43, Ch. 154, L. 1917;
re-en. Sec. 4121, R. C. M. 1921.

56 Am. Jur. 345, Warehouses, § 51.

88-144. (4122) Warranty in case of negotiation or transfer of receipt for value. A person who, for value, negotiates or transfers a receipt by indorsement or delivery, including one who assigns, for value, a claim secured by a receipt, unless a contrary intention appears, warrants—

- (a) That the receipt is genuine;
- (b) That he has a legal right to negotiate or transfer it;
- (c) That he has a knowledge of no fact which would impair the validity or worth of the receipt, and
- (d) That he has a right to transfer the title to the goods and that the goods are merchantable or fit for a particular purpose whenever such warranties would have been implied, if the contract of the parties had been to transfer without a receipt the goods represented thereby.

History: En. Sec. 44, Ch. 154, L. 1917;
re-en. Sec. 4122, R. C. M. 1921.

56 Am. Jur. 349, Warehouses, § 59.

88-145. (4123) Indorser of receipt not liable for what. The indorsement of a receipt shall not make the indorser liable for any failure on the part of the warehouseman or previous indorsers of the receipt to fulfill their respective obligations.

History: En. Sec. 45, Ch. 154, L. 1917;
re-en. Sec. 4123, R. C. M. 1921.

88-146. (4124) Mortgagee or pledgee when debt is paid not deemed to warrant what. A mortgagee, pledgee, or holder for security of a receipt who in good faith demands or receives payment of the debt for which such receipt is security, whether from a party to a draft drawn for such debt or from any other person, shall not by so doing be deemed to represent or to warrant the genuineness of such receipt or the quantity or quality of the goods therein described.

History: En. Sec. 46, Ch. 154, L. 1917;
re-en. Sec. 4124, R. C. M. 1921.

56 Am. Jur. 358, Warehouses, § 80.

88-147. (4125) Nonimpairment of the validity of negotiation of a receipt. The validity of the negotiation of a receipt is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the receipt was induced by fraud, mistake, or duress to entrust the possession or custody of the receipt to such person, if the person to whom the receipt was negotiated, or a person to whom the receipt was subsequently negotiated, paid value therefor, without notice of the breach of duty, or fraud, mistake, or duress.

History: En. Sec. 47, Ch. 154, L. 1917;
re-en. Sec. 4125, R. C. M. 1921.

88-148. (4126) Negotiations for value of a receipt not affected by what. Where a person having sold, mortgaged, or pledged goods which are in a warehouse and for which a negotiable receipt has been issued, or having sold, mortgaged, or pledged the negotiable receipt representing such goods, continues in possession of the negotiable receipt, the subsequent negotiation thereof by that person under any sale, or other disposition thereof to any person receiving the same in good faith, for value and without notice of the previous sale, mortgage or pledge, shall have the same effect as if the first purchaser of the goods or receipt had expressly authorized a subsequent negotiation.

History: En. Sec. 48, Ch. 154, L. 1917;
re-en. Sec. 4126, R. C. M. 1921.

88-149. (4127) Rights of purchaser for value of a receipt not defeated by seller's lien or stoppage in transit—unpaid seller to surrender receipt to warehouseman. Where a negotiable receipt has been issued for goods, no seller's liens or right of stoppage in transit shall defeat the rights of any purchaser for value in good faith to whom such receipt has been negotiated, whether such negotiation be prior or subsequent to the notification to the warehouseman who issued such receipt of the seller's claim to a lien or right of stoppage in transit. Nor shall the warehouseman be obliged to deliver or justified in delivering the goods to an unpaid seller unless the receipt is first surrendered for cancellation.

History: En. Sec. 49, Ch. 154, L. 1917;
re-en. Sec. 4127, R. C. M. 1921.

88-150. (4128) Penalty for warehouseman to issue receipt when goods have not been delivered. A warehouseman or any officer, agent, or servant of a warehouseman who issues or aids in issuing a receipt knowing that the goods for which such receipt is issued have not been actually received by such warehouseman, or are not under his actual control at the time of issuing such receipt, shall be guilty of a crime and upon conviction shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding five thousand dollars or by both.

History: En. Sec. 50, Ch. 154, L. 1917; Warehousemen § 36.
re-en. Sec. 4128, R. C. M. 1921. 67 C.J. Warehousemen and Safe Depositories § 292.

88-151. (4129) Penalty for warehouseman to fraudulently issue receipt. A warehouseman, or any officer, agent, or servant of a warehouseman, who fraudulently issues or aids in fraudulently issuing a receipt for goods know-

ing that it contains any false statement, shall be guilty of a crime and upon conviction shall be punished for each offense by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars or by both.

History: En. Sec. 51, Ch. 154, L. 1917;
re-en. Sec. 4129, R. C. M. 1921.

88-152. (4130) Penalty for warehouseman to issue duplicate negotiable receipt when original is outstanding without marking the same "duplicate." A warehouseman, or any officer, agent, or servant of a warehouseman, who issues or aids in issuing a duplicate or additional negotiable receipt for goods knowing that a former negotiable receipt for the same goods or any part of them is outstanding and uncanceled, without plainly placing upon the face thereof the word "duplicate," except in the case of a lost or destroyed receipt after proceedings as provided for in section 88-114, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding five thousand dollars or by both.

History: En. Sec. 52, Ch. 154, L. 1917;
re-en. Sec. 4130, R. C. M. 1921.

88-153. (4131) Penalty for issuing negotiable receipt for goods of which warehouseman is owner. Where there are deposited with or held by a warehouseman goods of which he is owner, either solely or jointly or in common with others, such warehouseman, or any of his officers, agents or servants who knowing this ownership, issues or aids in issuing a negotiable receipt for such goods which does not state such ownership shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars or by both.

History: En. Sec. 53, Ch. 154, L. 1917;
re-en. Sec. 4131, R. C. M. 1921.

88-154. (4132) Penalty for delivering goods against which negotiable receipt is outstanding without obtaining possession of same. A warehouseman, or any officer, agent, or servant of a warehouseman who delivers goods out of the possession of such warehouseman, knowing that a negotiable receipt, the negotiation of which would transfer the right to the possession of such goods if outstanding and uncanceled, without obtaining the possession of such receipt at or before the time of such delivery, shall, except in the cases provided for in sections 88-114 and 88-136, be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars or by both.

History: En. Sec. 54, Ch. 154, L. 1917;
re-en. Sec. 4132, R. C. M. 1921.

88-155. (4133) Penalty for negotiating receipt for deposited goods with defective title. Any person who deposits goods to which he has not title, or upon which there is a lien or mortgage, and who takes for such goods a negotiable receipt which he afterwards negotiates for value with intent to deceive and without disclosing his want of title or the existence of the lien or mortgage shall be guilty of a crime, and upon conviction, shall be pun-

ished for each offense by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars or by both.

History: En. Sec. 55, Ch. 154, L. 1917;
re-en. Sec. 4133, R. C. M. 1921.

88-156. (4134) What laws applicable in cases where this act does not prescribe rule. In any case not provided for in this act, the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy, or other invalidating cause, shall govern.

History: En. Sec. 56, Ch. 154, L. 1917;
re-en. Sec. 4134, R. C. M. 1921.

Warehousemen[Ⓒ]16.
67 C.J. Warehousemen and Safe Depositories § 60 et seq.

88-157. (4135) How act shall be interpreted and construed. This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

History: En. Sec. 57, Ch. 154, L. 1917;
re-en. Sec. 4135, R. C. M. 1921.

Statutes[Ⓒ]179.
59 C.J. Statutes § 567.

88-158. (4136) Definitions. (1) In this act, unless the context or subject-matter otherwise requires—

“Action” includes counter-claim, set-off, and suit in equity.

“Delivery” means a voluntary transfer of possession from one person to another.

“Fungible goods” means goods of which any unit is, from its nature or by mercantile custom, treated as the equivalent of any other unit.

“Goods” means chattels or merchandise in storage or which has been or is about to be stored.

“Holder” of a receipt means a person who has both actual possession of such receipt and a right of property therein.

“Order” means an order by indorsement on the receipt.

“Owner” does not include mortgagee or pledgee.

“Person” includes a corporation or partnership or two or more persons having a joint or common interest.

To “purchase” includes to take as a mortgagee or as a pledgee.

“Purchaser” includes mortgagee and pledgee.

“Receipt” means a warehouse receipt.

“Value” is any consideration sufficient to support a simple contract.

An antecedent or pre-existing obligation, whether for money or not, constitutes value where a receipt is taken either in satisfaction thereof or as security therefor.

“Warehouseman” means a person lawfully engaged in the business of storing goods for profit.

(2) A thing done “in good faith,” within the meaning of this act, when it is in fact done honestly, whether it be done negligently or not.

History: En. Sec. 58, Ch. 154, L. 1917;
re-en. Sec. 4136, R. C. M. 1921.

Warehousemen[Ⓒ]2.
67 C.J. Warehousemen and Safe Depositories § 1 et seq.

88-159. (4137) To what receipts act does not apply. The provisions of this act do not apply to receipts made and delivered prior to the taking effect of this act.

History: En. Sec. 59, Ch. 154, L. 1917;
re-en. Sec. 4137, R. C. M. 1921.

88-160. (4138) Act, how cited. This act may be cited as the uniform warehouse receipts act.

History: En. Sec. 62, Ch. 154, L. 1917;
re-en. Sec. 4138, R. C. M. 1921.

CHAPTER 2

LOCATION OF WAREHOUSES AND ELEVATORS ON RAILROAD RIGHT-OF-WAY

- Section 88-201. Location of grain warehouse or elevator on right-of-way—preliminary proceedings.
 88-202. Jurisdiction of district court.
 88-203. Proceedings in district court.
 88-204. Appeals to supreme court.
 88-205. Elevators and warehouses to be deemed public.
 88-206. Time limit for construction of elevator or warehouse.
 88-207. Connection of railroad with elevator—sidetracks.

88-201. (6638) Location of grain warehouse or elevator on right-of-way—preliminary proceedings. Any person, firm, or corporation desirous of erecting and operating at or contiguous to any railway station or siding a warehouse or elevator for the purchase, sale, shipment, or storage of grain (including flaxseed) for the public for hire, may make application in writing, containing a description of that portion of the right-of-way of said railroad on which such person, firm, or corporation desires to erect a warehouse or elevator, and the size and capacity of the warehouse or elevator proposed to be erected, and the time for which it is desired to maintain such warehouse or elevator, to the person, firm, or corporation owning, leasing, or operating the railroad at such station or siding, for the right, privilege, and easement of erecting and maintaining for the time stated in such application, and for reasonable compensation for such warehouse or elevator as aforesaid, upon the right-of-way pertaining to such railway at such siding or station, and within and between the outside switches of the yard of such railway station or siding, and upon paying or securing in the manner hereinafter prescribed reasonable compensation for the right, privilege, and easement aforesaid, shall absolutely and unconditionally be entitled to the same. Provided, however, that if the person, firm, or corporation owning, leasing, or operating the railroad is not willing that the portion of the right-of-way selected by the applicant should be appropriated for such purpose, and the parties cannot agree as to the quantity and location of the land upon which such grain warehouse or grain elevator shall be erected, the matter shall be determined by the district court in the same manner and by the same proceeding for determining the amount of compensation to be paid where the parties cannot agree as to the amount.

History: En. Sec. 1, Ch. 43, L. 1913; Eminent Domain 33, 166-170.
re-en. Sec. 6638, R. C. M. 1921. 29 C.J.S. Eminent Domain §§ 59, 209,
211-218, 222-225.

88-202. (6639) Jurisdiction of district court. The application provided in the preceding section shall also state the amount the applicant deems reasonable compensation for the right, privilege, and easement he desires to acquire, and said applicant shall tender and pay to such person, firm, or corporation, from whom such easement is sought, the sum stated in such application, and in case the amount so named and tendered is not accepted, and the parties cannot agree on the amount to be paid for such right, privilege, and easement, the same shall be ascertained, assessed, and determined by proceedings in the district court of the county in which the station or siding at which the right, privilege, and easement sought is situated, which court is hereby given full jurisdiction in the premises, and shall at all times be deemed open and in session for the purposes of this chapter. It shall be the duty of any person, firm, or corporation to whom application is made for the right to erect and maintain an elevator or warehouse, under the provisions of this chapter, within thirty days after the receipt of such application, to notify said applicant in writing of the acceptance or rejection of the amount stated in said application to be reasonable compensation for the right, privilege, and easement sought to be acquired, and in case such person, firm, or corporation fails to notify the applicant within said thirty days, such person, firm, or corporation shall be deemed to have accepted said amount, and upon the payment or tender thereof, said applicant shall be deemed to have acquired the right, privilege, and easement applied for.

History: En. Sec. 2, Ch. 43, L. 1913;
re-en. Sec. 6639, R. C. M. 1921.

88-203. (6640) Proceedings in district court. Proceedings in the district court shall be instituted and carried on as follows: The parties seeking the right, privilege, and easement aforesaid shall present to and file with the district court a petition in writing and under oath, specifying and describing the right, privilege, and easement sought, and the time for which the same is sought and the fact that the parties to the proceedings are unable to agree upon the amount of compensation therefor. A copy of the application for such privilege shall be attached to said petition, and thereupon it shall be at once the duty of the court by its order in writing to fix a time, not more than thirty days thereafter, within which the said person, firm, or corporation so owning, managing, or controlling such railroad shall appear and join issue in said proceeding. Such notice shall be served as a summons is served in civil actions, and shall be ample notice to the parties so served to appear and join in the proceedings, and shall be ample to give the court full jurisdiction over the party against whom the proceedings are instituted and the property involved in the proceeding. The manner of joining issue and the procedure at the trial shall be the same as that in any other civil action at law. The trial of such issue shall be expedited by the court as much as possible. At the trial the court or jury, as the case may be, shall find and assess the compensation, both in the form of an annual rental and in the form of a gross sum, for the

right, privilege, and easement sought, and immediately after the finding or verdict has been made, the party against whom the proceedings have been taken shall elect whether to receive the annual rental or the gross sum found, and in case such election is not made by said party, then the other party to the proceedings may make such election, and after election is made as aforesaid, judgment shall be rendered adjudging, among other things, that upon payment of the gross sum found, or the annual rental found, yearly in advance, as the case may be, the party instituting the proceedings shall be entitled to the right, privilege, and easement of erecting and maintaining the elevator or warehouse asked for in the application and petition aforesaid, and for the time therein specified; and thereupon the party in whose favor said judgment is rendered shall be entitled to a writ of execution in proper form to immediately invest such party with the right, privilege, and easement aforesaid. In case the annual rental is elected, the same shall be paid yearly in advance, and if not so paid after thirty days' default, the right, privilege, and easement aforesaid shall be absolutely forfeited.

History: En. Sec. 3, Ch. 43, L. 1913; Eminent Domain 172-249.
re-en. Sec. 6640, R. C. M. 1921. 29 C.J.S. Eminent Domain § 209 et seq.

88-204. (6641) Appeals to supreme court. Within thirty days after the entry of said judgment as hereinbefore provided, but not later, an appeal may be taken by either party to the supreme court; but such appeal shall not stay or hinder the use or enjoyment to the fullest extent of the right, privilege, and easement asked for by the petition and conferred by the judgment, if the party instituting the proceedings shall make and file a bond with sureties, to be approved by the court, in an amount double the gross sum or annual rental, conditioned to pay such sum or rental and to abide and satisfy any judgment the supreme court may render in the premises. Costs and disbursements, as in civil actions, in each court, shall be paid by the unsuccessful party. If the finding of the court or jury is for a less or the same amount as tendered by the petitioner before instituting the proceedings, then the petitioner shall be deemed the successful party. But if the amount found is larger than the sum tendered, then the petitioner shall be deemed the unsuccessful party. Either party may appeal from that part of the judgment determining the quantity and location of the land upon which such warehouse or elevator is to be erected, and in the event of such appeal the judgment shall be suspended pending the appeal.

History: En. Sec. 4, Ch. 43, L. 1913; Eminent Domain 250-263.
re-en. Sec. 6641, R. C. M. 1921. 30 C.J.S. Eminent Domain § 343 et seq.

88-205. (6642) Elevators and warehouses to be deemed public. All elevators and warehouses erected and maintained under the provisions of this chapter shall be deemed public elevators, and public warehouses, and shall be subject to legislative control.

History: En. Sec. 5, Ch. 43, L. 1913; 30 C.J.S. Eminent Domain § 451; 67 C.J.
re-en. Sec. 6642, R. C. M. 1921. Warehousemen and Safe Depositaries §§ 3, 7.

Eminent Domain 318 et seq.; Warehousemen 1, 3.

88-206. (6643) Time limit for construction of elevator or warehouse.

Any person, firm, or corporation availing themselves of the provisions of this act shall, within sixty days after the amount to be paid for the easement acquired thereunder is finally determined, by agreement or by proceedings in court, commence the erection of the warehouse or elevator mentioned in the application, and complete the same within ninety days thereafter, and in case of failure to comply with the provisions of this section, such person or persons shall be deemed to have abandoned the right acquired, and the part or portion of the railroad right-of-way described in the application shall be subject to selection by other applicants who may desire to avail themselves of the provisions of this act.

History: En. Sec. 6, Ch. 43, L. 1913;
re-en. Sec. 6643, R. C. M. 1921.

Eminent Domain 323.
30 C.J.S. Eminent Domain §§ 456-458.

88-207. (6644) Connection of railroad with elevator—sidetracks.

Every railroad company or corporation organized under the laws of this state, or doing business therein, shall, upon application in writing, provide reasonable sidetrack facilities and running connections between its main track and elevators and warehouses upon or contiguous to its right-of-way at stations; and every such railroad corporation shall permit connections to be made and maintained in a reasonable manner with its sidetracks to and from any warehouse or elevator, without reference to its size, cost, or capacity, where grain is or may be stored; provided, that such railroad company shall not be required to construct or furnish any sidetracks except upon its own land or right-of-way; provided, the reasonable cost of the construction of such sidetracks and connections, except the cost of the rails and fastenings, shall be paid by the person or persons for whose benefit such sidetracks are provided or connections made; provided further, that such elevators and warehouses shall not be constructed within one hundred feet of any existing structure, and shall be at safe fire distance from the station buildings, and so as not essentially to conflict with the safe and convenient operation of the road; and where stations are ten miles or more apart, the railroad company, when required so to do by the board of railroad commissioners of the state of Montana, shall construct and maintain a sidetrack for the use of shippers between such stations.

History: En. Sec. 7, Ch. 43, L. 1913;
re-en. Sec. 6644, R. C. M. 1921.

Railroads 87, 225.
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TITLE 89

WATERS AND IRRIGATION

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CHAPTER 1

WATER CONSERVATION BOARD, STATE

- Section
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89-101. (349.1) Water conservation a state purpose. It is hereby declared that the public interest, welfare, convenience and necessity require the construction of a system of works, in the manner hereinafter provided, for the conservation, development, storage, distribution and utilization of water. The construction of said system of works, is and is hereby declared to be, a single object; and the construction, operation and maintenance of said system of works, as herein provided for, is, hereby declared to be, a single object; and the construction, operation and maintenance of said system of works, as herein provided for, is hereby declared to be in all respects for the welfare and benefit of the people of the state, for the improvement of their prosperity and living conditions; and the state water conservation board hereinafter created shall be regarded as performing a governmental function in carrying out the provisions of this act.

History: En. Sec. 1, Ch. 35, Ex. L. 1933.

Acts Not Impliedly Repealed

Under the rules that repeals by implication are not favored by the courts, and the intention of the legislature gathered, inter alia, from the history of the act, and effort made to reconcile the statutes in question, held, that ch. 35, laws ex. ses. 1933-34 (89-101 et seq.), and ch. 95, laws of 1935, amendatory thereof, were not im-

pliedly repealed by chapter 169 also passed at the 1935 session (89-401 and 89-402). State ex rel. Normile v. Cooney et al., 100 M 391, 397, 398, 47 P 2d 637.

Constitutional

Secs. 89-101 et seq. held constitutional under provisions of Montana constitution cited. State ex rel. Normile v. Cooney, 100 M 391, 47 P 2d 637.

Federal Court Without Jurisdiction of Action Against Board

The Montana water conservation board is a mere arm of the state, and, hence, action by nonresident corporation against the board and its members to enjoin interference with corporation's water rights was in effect an action against the state, so that federal district court was without jurisdiction to entertain it. (Jud. Code sec. 24(1), as amended, 28 U.S.C.A. sec. 41(1). Citing secs. 89-101 to 89-141.) Broadwater-Missouri Water Users' Assn. et al. v. Montana Power Co., 139 Fed. 2d 998, 1000.

References

Farmers State Bank of Conrad v. City of Conrad, 100 M 415, 420, 47 P. 2d 853; Kraus v. Riley, 107 M 116, 119, 80 P. 2d 864; Federal Land Bank v. Morris, 112 M 445, 456, 116 P. 2d 1007.

Waters and Water Courses—213.

67 C.J. Waters § 10.

17 Am. Jur. 777 et seq., Drains and Sewers; 30 Am. Jur. 595 et seq., Irrigation; 56 Am. Jur. 481 et seq., Waters.

89-102. (349.2) Definitions. As used in this act, the following words and terms shall have the following meanings:

(a) The word "board" shall mean the state water conservation board hereinafter created.

(b) The word "works" shall be deemed to include all property, rights, easements and franchises relating thereto and deemed necessary or convenient for their operation, and all water rights acquired or exercised by the board in connection with such works, and shall embrace all means of conserving and distributing water, including, without limiting the generality of the foregoing, reservoirs, dams, diversion canals, distributing canals, lateral ditches and pumping units, mains, pipelines and waterworks systems and shall include all such works for the conservation, development, storage, distribution and utilization of water including, without limiting the generality of the foregoing, works for the purpose of irrigation, development of power, watering of stock, supplying of water for public, domestic, industrial and other uses for fire protection.

(c) The term "cost of works" shall embrace the cost of construction, the cost of all lands, property, rights, easements and franchises acquired, which are deemed necessary for such construction, the cost of all water rights acquired or exercised by the board in connection with such works, the cost of all machinery and equipment, financing charges, interest prior to and during construction and for a period not exceeding three (3) years after the completion of construction, cost of engineering and legal expenses, plans, specifications, surveys, estimates of cost, and other expenses necessary or incident to determining the feasibility or practicability of any project, administrative expense and such other expenses as may be necessary or incident to the financing herein authorized and the construction of the works and the placing of the same in operation.

(d) The word "owner" shall include all individuals, irrigation districts, incorporated companies, societies or associations having any title or interest in any properties, rights, easements or franchises to be acquired.

(e) The word "project" shall mean any one of the works hereinabove defined or any combination of such works which are physically connected or jointly managed and operated as a single unit.

(f) In case any water rights shall be acquired or exercised by the board in connection with two or more works and/or projects, the board by resolution shall apportion or allocate to each of such works and/or

projects such part of such water rights as it may determine, and upon the adoption of such a resolution, such water rights shall be deemed to be a part of each of such works and/or projects to the extent that such water rights have been so apportioned or allocated thereto respectively.

History: En. Sec. 2, Ch. 35, Ex. L. 1933; Statutes 199.
amd. Sec. 1, Ch. 95, L. 1935. 59 C.J. Statutes § 587.

89-103. (349.3) State water conservation board—officers—meetings—quorum—employees—counsel—compensation. (1) There is hereby created a board to be known as the "state water conservation board," and by that name the board may sue and be sued, plead and be impleaded, and contract and be contracted with. The board shall consist of five (5) members, and the governor and state engineer shall be members ex officio. The three (3) remaining members shall be qualified electors of the state and shall be appointed by the governor. Immediately after the passage and approval of this act, and before the adjournment of the present legislative assembly, the governor shall appoint one (1) member whose term of office shall expire on the second (2) Monday in January, 1935, another member whose term of office shall expire on the second (2) Monday in January, 1937, and another member whose term of office shall expire on the second (2) Monday in January, 1939, and their successors shall be appointed for a term of six (6) years, except that any person appointed to fill a vacancy shall be eligible for reappointment. Any of the appointed members of the board may be removed by the governor at any time, and any vacancy caused by the death, removal, or resignation or disqualification of any appointed member shall be filled by appointment as hereinabove provided. Succeeding appointments, except when made to fill a vacancy, shall be made on or before the second (2) Monday in January during the biennial session of the legislative assembly preceding the commencement of the term for which the appointment is made. Before entering upon the discharge of his duties, each appointed member shall take, subscribe and file with the secretary of state the oath prescribed by the constitution.

(2) The governor shall be the chairman of the board and the vice-chairman shall be the secretary and treasurer of the board. The board shall maintain its principal office in the city of Helena and may maintain such branch offices as it may determine. It shall elect a vice-chairman at its first meeting who shall preside at all meetings of the board when the chairman thereof is absent. It may provide for the holding of regular meetings and may hold a special meeting for the transaction of any business which may properly come before the board at any time and at any place in the state upon the call of the chairman or the vice-chairman or any two (2) members, notice of which may be given by telegram or by depositing in the mails at least forty-eight (48) hours before the meeting; but no notice shall be necessary if at least four (4) members of the board shall be present. A majority in number of the members shall constitute a quorum and the affirmative or negative vote of three (3) members shall be necessary to bind the board.

(3) The board shall have and adopt a seal bearing its name, which seal shall be affixed to such records and other instruments as it may direct, and all courts shall take judicial notice of said seal. It is authorized to adopt

from time to time, as necessary or expedient, suitable rules and regulations for the administration of this act. The attorney general shall act as legal adviser for the board and shall perform such legal services as the board may request; he shall receive his actual and necessary expenses when engaged in travel in the performance of such services. With his consent the board may employ additional legal counsel, and the board may also appoint such technical and other assistants and employees as may be necessary to enable it to perform its duties and carry out the purposes of this act, and may fix their compensation and secure such fidelity bonds as it may deem advisable.

(4) Each appointed member of the board shall receive, as compensation for his services, the sum of ten dollars (\$10.00) per day for each day actually engaged in the performance of the duties of his office, including time of travel between his home and the place at which he performs such duties, together with actual traveling and maintenance expenses while away from his home in the performance of the duties of his office. All such compensation and expenses shall be paid solely from the funds provided under the authority of this act. The state engineer shall exercise such powers and perform such duties, in addition to his regular duties as state engineer and as the board shall prescribe, and may receive and be paid such additional salary for such additional duties as may be fixed by the board.

History: En. Sec. 3, Ch. 35, Ex. L. 1933.

7 C.J.S. Attorney General § 5; 67 C.J. Waters § 10.

Attorney General § 6; Waters and Water Courses § 36 et seq.

89-104. (349.4) Acquisition of necessary property. The board shall have power to acquire by purchase, or exchange upon such terms and conditions and in such manner as it may deem proper, and to acquire by condemnation in accordance with and subject to the provisions of any and all existing laws applicable to the condemnation of property for public use, any land, rights, water rights, easements, franchises and other property deemed necessary or proper for the construction, operation and maintenance of such works. Title to property purchased or condemned shall be taken in the name of the board. The board shall be under no obligation to accept and pay for any property condemned under this act except from the funds provided by this act, and in any proceedings to condemn, such orders may be made by the court having jurisdiction of the suit, action or proceeding as may be warranted by law and the facts.

In condemnation proceedings brought under the powers of eminent domain for the purpose of carrying out the provisions of this act, all persons interested in the title of or holding liens upon the property sought to be acquired as disclosed by the public records, shall be made parties, and the court in such action shall partition and distribute the damages awarded, if any, among such persons as their rights are made to appear. In the event of controversy between them the court may direct the amount of such damage awarded to be paid into court to abide the result of further appropriate proceedings either at law or in equity.

The taking possession of the property sought to be condemned shall not be delayed by reason of any dispute between such rival claimants or the failure to join any of them as a party to said proceedings in condemnation.

History: En. Sec. 4, Ch. 35, Ex. L. 1933. Eminent Domain—28, 29; Waters and Water Courses—217.
Cross-Reference 29 C.J.S. Eminent Domain §§ 45, 47; 67
 State lands, sale to board, sec. 81-801. C.J. Waters § 10.

89-105. (349.5) Power of board to construct works and to act beyond jurisdiction. The board is hereby authorized to construct, whenever it shall deem such construction expedient, any public works as hereinabove defined, the cost of such construction to be paid wholly by means of or with the proceeds of revenue bonds hereinafter authorized or of a grant to aid in financing such construction from the United States of America or any instrumentality or agency thereof and of other funds provided under the authority of this act. Before constructing any project, the board shall make estimates of the cost of the project, of the cost of maintaining, repairing and operating the same, and of the revenues to be derived therefrom, and no such project shall be constructed unless, according to such estimates, the revenues to be derived therefrom will be sufficient to pay the cost of maintaining, repairing and operating the same, and to pay the principal and interest of revenue bonds which may be issued for the cost of such project; provided, however, that in connection with the issuance of any of such bonds, the failure of the board to make the estimates required by this section or to make same in proper form shall in no way affect the validity or enforceability of any such bonds or of the trust indenture, resolution or other security therefor.

The purpose of this act is to meet, so far as possible, a state-wide need for the conservation and use of water, through the construction and operation of projects designed for such purposes. The board is therefor empowered to make such investigations as may be necessary to plan and carry out a comprehensive state-wide program of water conservation. The projects to be finally constructed shall qualify as parts of such state-wide program and shall be approved by the board upon the showing of their prospective ability to meet, through the sale of water or other services, the cost of operation, maintenance and repair and the amortization of the cost of the construction; provided, however, that the failure of the board to determine such prospective ability of a project shall in no way affect the validity or enforceability of any of such bonds or of the trust indenture, resolution, or other security therefor.

The board may exercise any of its powers:

(a) In any adjoining state, unless the exercise of such power is not permitted under the laws of such state or of the United States of America.

(b) In any national forest or public domain of the United States of America adjoining, or located in, the state of Montana, unless the exercise of such powers is not permitted under the laws of the United States of America.

(c) In any adjoining country unless the exercise of such powers is not permitted under the laws of such country or of the United States or under the treaties between such country and the United States; provided that the provisions of sections 89-120, 89-121, 89-122 and 89-124 shall not apply to waters appropriated and located outside the state so long as such waters are located outside the state or to rights in waters appropriated and

located outside the state, and that all such waters shall be appropriated and all rights in such waters acquired by the board in compliance with the laws of the jurisdiction in which such waters are located and appropriated and with the laws of the United States.

History: En. Sec. 5, Ch. 35, Ex. L. 1933;
amd. Sec. 2, Ch. 95, L. 1935.

Waters and Water Courses—217.
67 C.J. Waters § 10.

89-106. Water conservation board may construct irrigation works across streams, highways, etc. The state water conservation board of the state of Montana shall have the power to construct irrigation works across any stream of water, watercourse, streets, avenues, highways, railways, canals, ditches or flumes which the route of said canal or canals may intersect or cross, in such manner as to afford security to life and property; but the board shall restore the same, when so crossed or intersected, to its former state, as near as may be, so as not to destroy its usefulness; and every company whose railroads shall be intersected or crossed by said works shall unite with said board in forming said intersection and crossing; and if such railroad company and said board, or the owners and controllers of said property, thing, or franchise so to be crossed cannot agree upon the amount to be paid therefor, or the points or the manner of said crossing or intersections, the same shall be ascertained and determined in all respects as herein provided in respect to taking of land for public use.

But nothing herein contained shall require the payment to the state or any subdivision thereof, of any sum for the right to cross any public highway with any such works. The right-of-way is hereby given, dedicated, and set apart to locate, construct, and maintain said works over and through any of the lands which are now or hereafter may be the property of this state.

History: En. Sec. 1, Ch. 69, L. 1937.

Waters and Water Courses—217.
67 C.J. Waters §§ 10 et seq., 856 et seq.

89-107. State water conservation board authorized to construct Sidney pumping project. The state water conservation board of the state of Montana is hereby authorized and empowered to construct and operate a certain irrigation project in the vicinity of Sidney, Montana, an application for which project has been presented by the state water conservation board to the federal emergency administration of public works and is known and designated in such federal emergency administration of public works as the "Sidney pumping project", P. W. A. docket Montana No. 1114-R, and to make all necessary arrangements and contracts with the federal emergency administration of public works for the financing, construction and operation of said project.

History: En. Sec. 1, Ch. 155, L. 1937.

89-108. Appropriation of water from Yellowstone River. The said state water conservation board is further authorized and empowered to appropriate and divert waters from the Yellowstone River for the construction of said project and to convey, permit and supervise the use of said waters in the state of North Dakota as well as the state of Montana, and to exercise all powers herein given to said board in connection with said project to the

same extent and in the same manner as if the said project was located wholly within the state of Montana.

History: En. Sec. 2, Ch. 155, L. 1937.

89-109. (349.6) Water conservation revenue bonds. (1) The board is hereby authorized to provide, by resolution, at one time or from time to time, for the issuance of water conservation revenue bonds of the state for the purpose of paying the cost as hereinabove defined of any one or more such public works, the principal and interest of which bonds shall be payable solely from the special fund herein provided for such payment. Such bonds shall mature at such time, or times, not more than forty (40) years from their date, or dates, as may be fixed by such resolution, but may be made redeemable before maturity at the option of the state, to be exercised by the board, at such price, or prices, and under such terms and conditions as may be fixed by the board prior to the issuance of the bonds. The board shall determine the rate of interest such bonds shall bear, not exceeding six per centum (6%) per annum, the time, or times, of payment of such interest, the form of the bonds and the interest coupons to be attached thereto, and the manner of executing the bonds and coupons, and shall fix the denomination, or denominations, of the bonds and the place, or places, of payment of principal and interest thereof, which may be at any bank or trust company within or without the state.

(2) All bonds issued under this act shall contain a statement on their face that the state shall not be obligated to pay the same or the interest thereon except from the special fund hereinafter set forth. In case any of the officers whose signatures appear on the bonds or coupons shall cease to be such officers before the delivery of such bonds, such signatures shall nevertheless be valid and sufficient for all purposes, the same as if they had remained in office until such delivery. All such bonds shall be and shall have and are hereby declared to have all the qualities and incidents of negotiable instruments under the negotiable instruments law of the state. Such bonds shall not constitute or be a debt, liability or obligation of the state, and shall be secured only by the revenues of such works and the funds received from the sale or disposal of water and from the operation, lease, sale or other disposition of the works, property and facilities to be acquired out of the proceeds of such bonds.

(3) Provisions may be made for the registration of any of the bonds in the name of the owner as to principal alone or as to both principal and interest. The bonds authorized under the provisions of this act may be issued and sold from time to time, and in such amounts as may be determined by the board, and the board may sell the bonds in such manner and for such price as it may determine to be for the best interests of the state, but no such sale shall be made for less than a price which, computed with relation to the absolute maturity of the bonds in accordance with standard tables of bond values, will show a net return of six per centum (6%) per annum to the purchaser upon the amount paid therefor. The proceeds of such bonds shall be used solely for the payment of the cost of the works and shall be checked out in such manner and under such restrictions, if any, as the board may provide.

(4) If the proceeds of the bonds, by error of calculation or otherwise, shall be less than the cost of the works, additional bonds may in like manner be issued to provide the amount of such deficit and, unless otherwise provided in the trust indenture hereinafter mentioned or in the resolution authorizing the bonds, shall be deemed to be of the same issue and shall be entitled to payment from the same fund, without preference or priority of the bonds, first issued for the same works. If the proceeds of bonds issued for any such works shall exceed the cost thereof, the surplus shall be paid into the fund hereinafter provided for the payment of principal and interest of such bonds. Prior to the preparation of definitive bonds, the board may under like restrictions issue temporary bonds with or without coupons, exchangeable for definitive bonds when such bonds have been executed and are available for delivery. Such bonds may be issued without any other proceedings or the happening of any other conditions or things than those proceedings, conditions and things which are specified and required by this act or by the constitution of the state.

(5) Each resolution providing for the issuance of bonds shall set forth the project or projects for which the bonds are to be issued, and the bonds authorized by each such resolution shall constitute a separate series. The bonds of each series shall be identified by a series letter or letters, and may be sold and delivered at one time or from time to time.

History: En. Sec. 6, Ch. 35, Ex. L. 1933.

Bonds Issued Not State Indebtedness

Issuance of bonds by water conservation board does not create a debt of the state in excess of the constitutional limit prescribed by sec. 2, art. XIII since this section provides that all bonds shall contain a statement that they do not constitute a state debt or liability and the bonds are made payable only from revenue of the works to be constructed. State ex rel. Normile v. Cooney, 100 M 391, 410, 47 P 2d 637.

Issuance of Revenue Bonds in Aid of Emergency Relief Act

Issuance of revenue bonds by the water conservation board to aid in the construction of a dam and reservoir under ch. 85, sec. 1, l. 1937 (omitted), to the extent of agreeing to take up relief warrants issued by the county sponsoring the project with the proceeds, bonds to be secured by reve-

nue obtained from the members of a water users' association using the stored water, is not a lending of the credit of the state or of any of its subdivisions to the association, within the meaning of art. XIII, sec. 1 of the constitution, nor a violation of art. XIII, sec. 4, thereof, prohibiting the state from assuming the debt of a county or municipal corporation. Kraus v. Riley, 107 M 116, 123, 80 P 2d 864.

Power of Board to Issue Revenue Bonds to Be Retired by Funds Obtained from Water Users

As against the contention that the water conservation board is without power to issue revenue bonds to be retired by funds obtained from water users, held, that such power is expressly conferred by this section et seq. Kraus v. Riley, 107 M 116, 123, 80 P 2d 864.

States—147 et seq.
67 C.J. Waters § 10.

89-110. (349.7) Lien upon bond proceeds. All moneys received from any bonds issued pursuant to this act shall be applied solely to the payment of the cost of the works or to the appurtenant sinking fund and to the "administration fund" as hereinafter provided, and there shall be and hereby is created and granted a lien upon such moneys until so applied, in favor of the holders of the bonds or the trustee hereinafter provided for in respect of such bonds.

History: En. Sec. 7, Ch. 35, Ex. L. 1933.

States—156.
59 C. J. States § 416.

89-111. (349.8) Trust indenture, resolution and covenants of board.

(1) In the discretion of the board, any series of such bonds may be secured by a trust indenture by and between the board and a corporate trustee, which may be any trust company or bank having the powers of a trust company within or outside of the state. Each trust indenture or an executed counterpart thereof shall be filed in the office of the secretary of state of Montana. The filing of a trust indenture or an executed counterpart thereof in the office of the county clerk of the county in which the property covered by said trust indenture is located shall constitute constructive notice of the contents thereof to all persons from the time of such filing and no recording of such trust indenture or the contents thereof shall be necessary.

(2) Either the resolution providing for the issuance of bonds or such trust indenture may contain such provisions for protecting and enforcing the rights and remedies of the bondholders as may be reasonable and proper, not in violation of law, including covenants setting forth the duties of the state and the board in relation to the acquisition, construction, improvement, maintenance, operation, repair, and insurance of the works, the custody, safeguarding and application of all moneys, and may provide that the works shall be acquired, constructed, or partly acquired and partly constructed and paid for under the supervision and approval of consulting engineers employed or designated by the board and satisfactory to the original purchasers of the bonds issued therefor, their successors, assigns, or nominees, who may be given the right to require that security given by contractors and by any depositary of the proceeds of the bonds or receipts and revenues of the works, or other moneys pertaining thereto, shall be satisfactory to such purchasers, successors, assigns, or nominees. Such resolution or indenture may set forth the rights and remedies of the bondholders and trustee, restricting the individual rights of action of bondholders as is customary in trust indentures, deeds of trusts and mortgages securing bonds and/or debentures of corporations. No enumeration of particular powers hereby granted shall be construed to impair any general grant of power herein contained. All expenses incurred in carrying out such trust indenture may be treated as a part of the cost of maintenance, operation and repairs of the works affected by such indenture.

(3) In connection with the issuance of any such bonds for the purpose of paying in whole, or as supplemented by a grant as aforesaid from the United States of America or any instrumentality or agency thereof, the cost of any works or project, or in order to secure the payment of such bonds, the board shall have power:

(a) To pledge all or any part of the income, profit and revenue of such works or project, and all moneys received from the sale or disposal of water, use of water, water storage, or other service, and from the operation, lease, sale or other disposition of all or any part of such works or project, and to covenant to pay such income, profit and revenue into the appropriate water fund and sinking fund.

(b) To covenant against pledging all or any part of the income, profit and revenue of such works or project and all moneys received from the sale or disposal of water, use of water, water storage, or other service, and

from the operation, lease, sale or other disposition of all or any part of such works or project.

(c) To covenant against mortgaging all or any part of such works or project, or against permitting or suffering any lien thereon.

(d) To covenant to fix and establish such prices, rates and charges for water and other services made available in connection with such works or project so as to provide at all times funds which will be sufficient, (1) to pay all costs of operation and maintenance of such works or project together with necessary repairs thereto, and (2) to meet and pay the principal and interest of all such bonds as they severally become due and payable, and (3) to create such reserves for the principal and interest of all such bonds and for the meeting of contingencies in the operation and maintenance of such works or project as the board shall determine; and to make such further covenants as to such prices, rates and charges as the board shall determine.

(e) To create special funds, in addition to those required by this act, for moneys reserved for principal and interest on bonds and/or for the meeting of contingencies in the operation and maintenance of such works or project and to determine the manner in which, and the depositary or depositaries in which, such funds shall be deposited and the manner in which the same shall be secured, and it shall be lawful for any bank or trust company incorporated under the laws of the state to act as such depositary and to furnish such indemnifying bonds or to pledge such securities as may be required by the board.

(f) To provide for the replacement of lost, destroyed or mutilated bonds.

(g) To covenant against extending the time for the payment of the principal or interest on any of such bonds, directly or indirectly by any means or in any manner.

(h) To prescribe and covenant as to the events of default and terms and conditions upon which any or all of such bonds shall become or may be declared due before maturity and as to the terms and conditions upon which such declaration and its consequences may be waived.

(i) To covenant as to the rights, liabilities, powers, and duties arising upon the breach by it of any covenant, condition, or obligation.

(j) To vest in a trustee or trustees the right to enforce any covenant made to secure or to pay such bonds, or to foreclose any trust indenture in relation thereto, to provide for the powers and duties of such trustee or trustees, to limit the liabilities thereof, and to provide the terms and conditions upon which the trustee or trustees or the holders of bonds or any proportion of them may enforce any such covenant or exercise the right of foreclosure.

(k) To make such covenants and do any and all such acts and things as may be necessary or convenient or desirable in order to secure such bonds, or, in the absolute discretion of the board, to make such bonds more marketable, notwithstanding that such covenants, acts or things may not be enumerated or expressly authorized herein.

(1) It being the intention hereof to give the board power to do all things in the issuance of such bonds, and in providing for their security that may not be inconsistent with the constitution of Montana.

History: En. Sec. 8, Ch. 35, Ex. L. 1933; States 147 et seq., 152.
amd. Sec. 3, Ch. 95, L. 1935. 59 C.J. States § 145 et seq.

References

Kraus v. Riley et al., 107 M 116, 124,
80 P 2d 864.

89-112. (349.9) Conveyance in trust or mortgage provisions may be included in bonds—rights of purchaser on foreclosure sale. In the discretion of the board any trust indenture executed by it as security for a series of such bonds may contain provisions for conveying in trust or mortgaging the works, the project, or any part of such works or project (including all water rights which are a part thereof), constructed with the proceeds of such bonds or with such proceeds as supplemented by the proceeds of a grant to aid in financing such construction from the United States of America or any instrumentality or agency thereof, and may be in such form, and with such rights, remedies and provisions as is customary in trust indentures, deeds of trust, and mortgages securing bonds and/or debentures of corporations. Any purchaser at any sale of any works or project pursuant to a judgment or decree in an action to foreclose a trust indenture conveying in trust or mortgaging any works or project shall obtain title to such works or project free from any trust or other obligation of the board, the state of Montana, or the public thereof, as to its operation, maintenance, use or disposition except the obligation to use all water impounded in such works or project for sale, rental, distribution, or other beneficial use.

History: En. Sec. 4, Ch. 95, L. 1935. States 160.
59 C.J. States § 424.

89-113. (349.10) Funds. The board shall create a fund to be known as "administration fund" and shall also create three (3) separate funds in respect of the bonds of each series, one (1) fund to be known as the "construction fund, series.....," another fund to be known as the "water fund, series.....," and another fund to be known as the "sinking fund, series.....," each such fund to be identified by the same series letter or letters as the bonds of such series. The moneys in each such fund shall be deposited in such depository or depositories and secured in such manner as may be determined by the board. It shall be lawful for any bank or trust company incorporated under the laws of this state to act as such depository and to furnish such indemnifying bonds or to pledge such securities as may be required by the board. A separate account shall be kept in each construction fund and in each water fund for each project. All expenditures not properly chargeable to the construction fund account or to the water fund account of any one project shall be charged by the board in such proportions as it shall determine to the construction fund accounts or to the water fund accounts, as the case may be, of the projects in respect of which such expenditures were incurred.

History: En. Sec. 9, Ch. 35, Ex. L. 1933.

59 C.J. States § 378; 67 C.J. Waters § 854 et seq.

States 217; Waters and Water Courses 217.

89-114. (349.11) Construction funds. The proceeds of the bonds of each series issued under the provisions of this act shall be placed to the credit of the appropriate construction fund, which fund shall at all times be kept segregated and set apart from all other funds. There shall also be credited to the appropriate construction fund all accrued interest upon the bonds and the interest received upon the deposits of moneys in such fund and moneys received by way of grant from the United States or from any other source for the construction of the works. The moneys in each construction fund shall be paid out or disbursed in such manner as may be determined by the board, subject to the provisions of this act, to pay the cost of the works as hereinabove defined. Any surplus which may remain in any construction fund after providing for the payment of the cost of the works shall be added to and become a part of the appropriate sinking fund hereinafter provided for.

History: En. Sec. 10, Ch. 35, Ex. L. 1933.

States 156.

59 C.J. States § 416.

89-115. (349.12) Water funds—rates—sale of water—lease and sale of water rights and property. The board is hereby authorized and empowered, subject to the provisions of this act, to fix and establish the prices, rates and charges at which any and all the resources and facilities made available under the provisions of this act shall be sold and disposed of; to enter into any and all contracts and agreements, and to do any and all things which in its judgment are necessary, convenient or expedient for the accomplishment of any and all the purposes and objects of this act, under such general regulations and upon such terms, limitations and conditions as it shall prescribe; and it is and shall be the duty of the board to enter into such contracts and fix and establish such prices, rates and charges so as to provide at all times funds which will be sufficient to pay all costs of operation and maintenance of any and all of the works authorized by this act, together with necessary repairs thereto, and which will provide at all times sufficient funds to meet and pay the principal and interest of all bonds as they severally become due and payable; provided, that nothing contained in this act shall authorize any change, alteration or revision of any such rates, prices or charges as established by any contract entered into under authority of this act except as provided by any such contract.

Every contract made by the board for the sale of water, use of water, water storage or other service, or for the sale of any property or facilities, shall provide that in the event of any failure or default in the payment of any moneys specified in such contract to be paid to the board, the board may, upon such notice as shall be prescribed in such contract, terminate such contract and all obligations thereunder. The act of the board in ceasing on any such default to furnish or deliver water, use of water, water storage or other service under such contract shall not deprive the board of, or

limit any remedy provided by such contract or by law for the recovery of any and all moneys due or which may become due under such contract.

The board is empowered to sell or otherwise dispose of any rights of way, easements or property when it shall determine that the same is no longer needed for the purposes of this act, or to lease or rent the same or to otherwise take and receive the income or profit and revenue therefrom. All income or profit and revenue of the works and all moneys received from the sale or disposal of water, use of water, water storage, or other service, and from the operation, lease, sale or other disposition of the works, property and facilities acquired under the provisions of this act, shall be paid to the credit of the appropriate water fund.

History: En. Sec. 11, Ch. 35, Ex. L. 59 C.J. States § 378; 67 C.J. Waters 1933. § 1082 et seq.

States 127; Waters and Water Courses 257.

89-116. (349.13) Sinking funds. The board shall provide, in the proceedings authorizing the issuance of each series of bonds or in the trust indenture securing the same, for the paying into the appropriate sinking fund at stated intervals all moneys then remaining in the water fund, after paying all costs of operation, maintenance and repairs of the works. All moneys in each sinking fund shall be pledged for the payment of and used only for the purpose of paying (a) the interest upon the bonds as such interest shall fall due, and (b) the necessary fiscal agency charges for paying bonds and interest, and (c) the principal of the bonds as they fall due, and (d) any premiums upon bonds retired by call or purchase as herein provided. Prior to the issuance of the bonds of each series, the board may provide by resolution or by such trust indenture for using the sinking fund or any part thereof in the purchase of any of the outstanding bonds payable therefrom at the market price thereof, but not exceeding the price, if any, at which the same shall at the next interest date be payable or redeemable, and all bonds redeemed or purchased shall forthwith be cancelled and no bonds shall be issued in place thereof. The moneys in each sinking fund, less such reserve as may be provided for in the resolution authorizing the bonds or in the trust indenture for the payment of interest and/or principal, if not used within a reasonable time for the purchase of bonds for cancellation as above provided, shall be applied to the redemption of bonds then subject to redemption at the redemption price then applicable.

History: En. Sec. 12, Ch. 35, Ex. L. States 165.
1933. 59 C.J. States § 422.

89-117. (349.14) Contracts with the United States. Notwithstanding any provisions of this act to the contrary, the board is empowered to enter into contracts and leases with the United States of America, its instrumentalities or agencies, or any thereof, for the purpose of financing the construction of any works authorized by this act, and may in such contracts or leases authorize the United States, its instrumentalities or agencies, to supervise and approve the construction, maintenance and operation of such works, or any project or portion thereof, until such times as any money expended, advanced or loaned by said United States, its instrumentalities or agencies,

and agreed to be repaid thereto by said board, shall have been fully repaid. It is the purpose and intent of this act that the board shall be authorized, and is hereby authorized and empowered, to accept cooperation from the United States of America, its instrumentalities and agencies, in the construction, maintenance and operation and in financing the construction, of any works authorized by this act, and the board shall have full power to do any and all things necessary in order to avail itself of such aid, assistance and cooperation under federal legislation now or hereafter enacted by Congress.

History: En. Sec. 13, Ch. 35, Ex. L. Waters and Water Courses 217.
1933. 67 C.J. Waters § 10.

89-118. (349.15) Powers and duties of board—actions at law—bond of secretary-treasurer. (1) The board shall keep full and complete accounts concerning all matters and things relating to the works and annually shall prepare balance sheets and income and profit and loss statements showing the financial condition of each project, and file copies thereof with the secretary of state. All books and papers pertaining to all matters provided for in this act shall at all reasonable times be open to the inspection of any party interested or any citizen of the state. Except as otherwise provided in this act, the board shall have full charge and control of the construction, operation and maintenance of the works and the collection of all rates, charges and revenues of whatsoever character therefrom. The board shall proceed immediately with the construction of the works upon funds being made available therefor and shall prosecute such works to completion as rapidly as possible. The board shall have power to sell, lease and otherwise dispose of all waters which may be impounded under the provisions of this act, and such water may be sold for the purpose of irrigation, development of power, watering of stock or any other purpose. To the extent that it may be necessary to carry out the provisions of this act, and subject to a compliance with the other provisions of this act, the board shall have full control of all the water of the state not under the exclusive control of the United States and not vested in private ownership, and it shall be its duty to take such steps as may be necessary to appropriate and conserve the same for the use of the people.

(2) The board shall have power to institute in any of the courts of this state, or in any other state, or in any of the federal courts of this state or any other state, any actions, suits, and special proceedings necessary to enable it to acquire, own, and hold title to lands for dam sites, reservoir sites, water rights, rights of way for diversion and distributing canals, and lateral ditches, and other means of distribution of water, and may also in all said courts institute, maintain, and prosecute to final determination any and all actions, suits and special proceedings necessary to have the water rights adjudicated upon any stream or source of water supply from which is derived the water for such reservoir, diversion and distributing canals, lateral ditches and other means of distribution of the water; and said board may join any and all owners of waters heretofore appropriated by any person, association or corporation from any of the streams of the state of Montana, so that adjudication may be had of all surplus water upon all the streams and sources of water supply of any project so con-

structed by said board. All costs and expenses of such actions, suits or special proceedings shall be paid by said board out of funds provided under the authority of this act.

The vice-chairman of the board, who shall act as secretary and treasurer, shall furnish a bond in the form and to the amount that shall be required by said board.

History: En. Sec. 14, Ch. 35, Ex. L. States 67; Waters and Water Courses 1933. 217, 254.

67 C.J. Waters § 10.

89-119. (349.16) Actions by trustee and bondholders. Any holder of any bonds issued under the provisions of this act or any of the coupons attached thereto, and the trustee, if any, except to the extent the rights herein given may be restricted by resolution passed before the issuance of the bonds or by the trust indenture, may, either at law or in equity, by suit, action, mandamus or other proceeding, including proceedings for the appointment of a receiver, protect and enforce any and all rights granted hereunder or under such resolution or trust indenture and may enforce and compel performance of all duties required by this act or by such resolution or trust indenture to be performed by the board. While any bonds issued by the board remain outstanding the powers, duties or existence of the board or any official or agency of the state shall not be diminished or impaired in any manner that will affect adversely the interests and rights of the holders of such bonds.

History: En. Sec. 15, Ch. 35, Ex. L. States 168.

59 C.J. States § 458 et seq.

89-120. (349.17) Appropriation and use of administration fund—receipt of other contributions and appropriations authorized. There is hereby created a special fund to be known as "administration fund," into which fund there is hereby appropriated out of any money in the treasury of the state, not otherwise appropriated, the sum of one hundred thousand dollars (\$100,000.00); provided, however, that such appropriation shall be deemed and held valid notwithstanding the provisions of the budget act. All general administrative expenses of the board and the cost of investigations as authorized in section 89-105, shall be paid from the administration fund and also the cost of all preliminary work on any project and all expenses directly chargeable to such project, prior to the receipt of the proceeds of bonds, shall be paid from the administration fund. The amount of all such expenses on account of any project or projects and such part of the general administrative expenses of the board and of the cost of investigation or investigations as shall be properly chargeable, in the opinion of the board, to such project or projects, shall be reimbursed to the administration fund upon the receipt of the proceeds of bonds issued for such project or projects. No liability or obligation shall be incurred under the provisions of this act beyond the extent to which money shall have been provided under the authority of this act. All public or private property damaged or destroyed in carrying out the powers granted under this act shall be restored or repaired and placed in their original condition, as nearly as practicable, or adequate compensation made therefor out of funds provided by this act.

The board shall also have authority to receive and accept appropriations and contributions from any source of either money or property or other things of value, to be held, used, and applied for the purposes in this act provided.

History: En. Sec. 16, Ch. 35, Ex. L.
1933.

States 127.
59 C.J. States § 378.

89-121. (349.18) Appropriation of waters—recording of notice—date of right. In acquiring the rights and administering the terms of this act herein prescribed and established, the board shall not be limited to the terms of the statutes of the state of Montana relating to water rights heretofore enacted; but, in addition thereto, may initiate a right to the waters of this state by executing a declaration in writing of the intention to store, divert or control the unappropriated waters of a particular body, stream or source, designating and describing in general terms such waters claimed, means of appropriation and location of use, and cause said notice to be filed in the office of the county clerk and recorder of the county where the major portion of the means of diversion or control will be located, which right shall vest in such board on the date of the filing of such declaration. It shall be the duty of the county clerk and recorder of each county of the state of Montana on presentation to receive, record and index such declaration, without charge, in the manner prescribed by law relating to notice of water rights.

A certified copy of the record of said declaration shall be received as competent evidence in all courts and deemed to be prima facie proof of all matters therein recited.

The priority of right shall date and continue from the time of such filing or recording, provided the means of actual appropriation shall be commenced by actual work of construction within two (2) years from the date of original recording. Change in means or place of diversion or control shall not affect the right of priority, if others are not thereby injured.

History: En. Sec. 17, Ch. 35, Ex. L.
1933.

Waters and Water Courses 131, 133.
67 C.J. Waters § 409 et seq.

89-122. (349.19) Extent of water right of board. The right of the board to the waters within the state of Montana so acquired as hereinbefore provided for the purpose defined in this act shall attach at and from their source and while flowing in the stream travelling to the means of control as well as when actually confined by such means. That the authority and jurisdiction of the board shall continue over said waters after they are released for purposes of use and continues to such places of use and through and by officers and agents acting under its authority may continue to exercise and assert actual possession over the corpus of such waters and prevent the diversion thereof without permission first obtained. The board may reclaim and possess all waters furnished or supplied by it seeping or overflowing from the previous place of use.

History: En. Sec. 18, Ch. 35, Ex. L.
1933.

from interfering with its right to divert from the canal conveyed by it to the board, 2000 inches reserved to it (presenting questions of identifying natural flow from project water brought from neighboring watershed intermingled with reflow or

Right to Reclaim and Possess

Held, in an injunction proceeding by an irrigation district to restrain the board

seepage water), that the district's contention that the last provision of this section relating to reclaim is invalid as impairing the district's vested interests, is without merit. *Allendale Irrigation Co. v.*

State Water Conservation Board, 113 M 436, 449, 127 P 2d 227.

Waters and Water Courses 133. 67 C.J. *Waters* § 418 et seq.

89-123. (349.20) Protection of prior rights—devices to be provided by appropriators—control may be granted to board. Wherever natural streams are employed as a means of diversion of water from the place of confinement to the place of use, the board shall adopt proper methods and means for determining the natural flow of such streams when the amount of such natural flow is insufficient to satisfy or fill the needs of appropriators prior in right.

All appropriators of the natural flow of said streams shall maintain headgates and measuring devices at their respective points of diversion for the purpose of enabling the board or its authorized agents to determine the amount of water being diverted at any time and authority is hereby conferred upon the board to adopt and exercise any method or act to prevent the diversion of any waters owned by it without permission first obtained.

Any person owning a water right on said stream may agree with the board that it shall have control of the diversion of the waters due such right, and, in such event, the board through its officers and agents may exercise the same authority over the waters due said appropriator and cause them to be delivered to him in the same manner as waters appropriated by the board.

History: En. Sec. 19, Ch. 35, Ex. L. 1933.

Waters and Water Courses 133 et seq. 67 C.J. *Waters* § 422 et seq.

89-124. (349.21) Conformity to federal regulations authorized. For the purpose of obtaining financial aid from the United States of America, the board may adjust the plans and operation of any project, created under this act, to conform to the laws and regulations of the federal government and the supervision of any board, bureau or commission constituted under such authority, and may exercise such powers whenever conferred.

History: En. Sec. 20, Ch. 35, Ex. L. 1933.

Waters and Water Courses 217. 67 C.J. *Waters* § 411.

89-125. (349.22) Powers of board concerning waters and appropriations thereof. The authority of the board conferred by the provisions of this act shall extend and be applied to any and all rights to the natural flow of the waters of this state which it may acquire by condemnation, purchase, exchange, appropriation or agreement.

For the purpose of regulating the diversion of such waters, the board may enter upon the means and place of use of all appropriators for making surveys of respective rights and seasonal needs.

The board may take into consideration the decrees of the courts of this state having jurisdiction, which purport to adjudicate the waters of any such stream or its tributaries, and a fair, reasonable, equitable reconciliation shall be made between the claimants asserting rights under different decrees and between decreed rights and asserted rights of appropriation not adjudicated by any court.

The board, at its discretion, may hold hearings relating to the rights of respective claimants after first giving such notice as it deems appropriate, and make findings of the date and quantity of appropriation and use of all claimants which the board will recognize and observe in diverting the waters which it owns. The board may police and distribute to the owner of any such recognized appropriation the waters due him upon request and under terms agreed upon.

The board, when engaged in controlling and dividing the natural flow of any stream under the authority granted by this act, shall be deemed to be exercising a police power of the state of Montana, and water commissioners appointed by any court shall not have any authority or jurisdiction to deprive the board of any of the waters owned or administered under agreement with respective owners, provided the owner of any prior right contending that the board is not recognizing and respecting such appropriation may resort to a court of equity for the purpose of determining whether or not the rights of said claimant have been invaded and the board shall observe the terms of such final decree.

On the board impounding or acquiring the right of appropriation of the waters of any stream, it may divert or authorize the diversion at any point on said stream, or any portion thereof, when the same may be done without injury to any prior appropriator.

Nothing herein contained shall repeal, amend, or modify any existing acts or statutes pertaining to the appropriation or use of water except as herein otherwise expressly provided, and nothing herein contained shall be deemed to interfere with any vested rights to the use of water.

History: En. Sec. 21, Ch. 35, Ex. L. 1933.

Action Not Maintainable in Federal District Court

An action by nonresident corporation against Montana water conservation board and its members to enjoin interference with corporation's water rights was not maintainable in federal district court on ground that board was acting in excess of its statutory authority in that board was invading plaintiff's vested rights as a

prior appropriator which were recognized by the act creating the board, since there was no presumption at outset that in pursuing program outlined for it the board would violate prior rights. (Jud. Code sec. 24(1), as amended, 28 U.S.C.A. sec. 41(1); citing secs. 89-101 to 89-141.) *Broadwater-Missouri Water Users' Assn. et al. v. Montana Power Co.*, 139 Fed. 2d 998, 1002.

Waters and Water Courses—133 et seq.
67 C.J. Waters § 411.

89-126. (349.23) Board a body corporate. The state water conservation board shall be a body corporate and politic with perpetual existence, and as such, it shall be deemed to be an agency of the state of Montana.

History: En. Sec. 5, Ch. 95, L. 1935.

Waters and Water Courses—36.
67 C.J. Waters § 10.

89-127. (349.24) Sale or disposal of waters—disposal of waterworks systems, provision for. In addition to the powers conferred hereby upon the state water conservation board to sell, lease and otherwise dispose of waters for the purpose of irrigation, development of power, watering of stock, or other purposes, the board shall have power to sell, lease and otherwise dispose of waters from its waterworks systems for public, domestic, industrial and other uses and for fire protection. The board is empowered to sell or otherwise dispose of any such waterworks system which is not oper-

ated for the purpose of irrigation or development of power, after the discharge of all of the bonds issued by the board to finance the construction or acquisition thereof and of all interest thereon and costs and expenses incurred in connection with any action or proceeding by or on behalf of the holders of such bonds; provided, however, that no such sale or other disposition shall be made except to a municipality, political subdivision, authority or other public body of the state.

History: En. Sec. 6, Ch. 95, L. 1935.

Waters and Water Courses 254.

References

67 C.J. Waters §§ 10, 411, 614, 856.

Farmers' State Bank of Conrad v. City of Conrad, 100 M 415, 420, 47 P 2d 853.

89-128. (349.25) Act liberally construed. This act, being necessary for the welfare of the state and its citizens, shall be liberally construed to effect the purposes hereof.

History: En. Sec. 22, Ch. 35, Ex. L. 1933.

Statutes 179.

59 C.J. Statutes § 567.

89-129. (349.26) Emergency declaration. For more than five years a state-wide emergency and economic depression, productive of widespread agricultural collapse, unemployment and disorganization of trade and industry, which burdens commerce, affects the public welfare and undermines the standard of living of the people in this state is hereby declared to exist and it hereby is recognized that such an emergency exists throughout this state and the nation.

History: En. Sec. 1, Ch. 96, L. 1935.

16 C.J.S. Constitutional Law §§ 174, 175, 177, 180, 182-194, 197, 198; 51 C.J. Public Utilities §§ 12, 16.

Constitutional Law 81.

89-130. (349.27) Declaration of policy of state. The Congress of the United States of America has heretofore enacted statutes designed to promote the rehabilitation of agriculture, of trade and industry and furnish relief to unemployment from the economic depression prevailing throughout the United States, including the state of Montana, and has provided moneys, funds and resources authorized to be employed for objects, purposes and terms designated by the terms of such statutes of the United States, and it is hereby declared to be the policy of the state of Montana, to provide for the general welfare by cooperating with and assisting the national government, to effectuate the objects, purposes and benefits of such national legislation in promoting the rehabilitation of agriculture, trade and industry through conservation and development of natural resources and electrification; resuscitation and revival of the mineral industry; in promoting the organization of industry for the purpose of cooperative action among trade groups; to increase the consumption of industrial and agricultural products; to reduce and relieve unemployment; to improve living conditions and standard of labor; to provide for the construction of useful public works and otherwise to rehabilitate industry and conserve natural resources and otherwise as announced by the acts of the Congress of the United States.

History: En. Sec. 2, Ch. 96, L. 1935.

89-131. (349.28) Powers of board to cooperate with federal government. The state water conservation board created by the extraordinary session of

the twenty-third legislative assembly hereinafter called the board shall in addition to the powers, authority and duties heretofore conferred by law, have the power and authority to cooperate with the federal government or any board or agency thereof, and to avail itself of any authority of federal laws, rules and regulations, in relation to and in connection with the provisions of the statutes of the United States enacted by the Congress of the United States designed to promote flood control, rehabilitation of agriculture, of trade and industry through projects designed to furnish relief to unemployment; to provide electrical and other services and generally to promote rehabilitation of the people of the state of Montana, when any such project or proposal shall be approved and adopted by both the federal government and said board and to fully carry out the purposes and objects of this act.

History: En. Sec. 3, Ch. 96, L. 1935.

Waters and Water Courses—36 et seq.
67 C.J. Waters § 10.

89-132. (§49.29) Powers of board to carry out policy of state—agreements—powers under public works program. In order to effectuate and carry out the declared policy of this act and to enable this state to avail itself of the provisions of the acts of Congress to cooperate with the president of the United States, any department, board or agency thereof, the said board is hereby vested with power and authority to make rules and regulations for the carrying out of the declared policy of this state and the provisions of this act, and to enter into agreements with the president of the United States, any department, board or agency thereof as may be prescribed and to issue "Revenue Bonds" and to accept grants in addition thereto for such projects; execute and deliver such instruments in writing, to undertake a program of public works which may include among other things the following:

(a) Construction of reservoirs, irrigation and drainage systems or projects and flood control projects and works.

(b) The construction, maintenance and/or operation of any projects of any character eligible for loans under the provisions of the acts of Congress, not otherwise provided with satisfactory agencies for cooperation with the federal government in such work.

(c) To acquire land, construct, maintain and operate works and systems for the conservation and development of natural resources.

(d) To accept from any federal agency grants for and in aid of the carrying out of the purposes of this act and of any acts of Congress.

(e) To make contracts and execute instruments containing such terms, provisions, and conditions as in the discretion of the board may be necessary, proper or advisable for the purpose of obtaining grants or loans, or both, from any federal agency pursuant to or by virtue of any and all acts of Congress; to make all other contracts and execute all other instruments necessary, proper or advisable in or for the furtherance of any public works projects and to carry out and perform the terms and conditions of all such contracts or instruments.

(f) To subscribe to and comply with any and all applicable acts of Congress and regulations made by any federal agency with regard to any grants or loans, or both, from any federal agency.

(g) To perform any acts authorized under this act through, or by means of its own officers, agents and employees, or by contracts with corporations, firms or individuals.

(h) To construct any projects or public works by contract or otherwise as prescribed by act of Congress or by any rules or regulations thereunder.

(i) To sell bonds at private sale to any federal agency without any public advertisement.

(j) To issue interim receipts, certificates or other temporary obligations, in such form and containing such terms, conditions and provisions as the board may determine, pending the preparation or execution of definitive bonds for the purpose of financing the construction of projects provided by any of the acts of Congress.

(k) To issue bonds bearing the signatures of officers in office on the date of signing such bonds, notwithstanding that before delivery thereof any or all the persons whose signatures appear thereon shall have ceased to be the officers of the board.

(l) To include in the cost of any project:

1. All organization costs;
2. Engineering, plans, specifications, surveys, estimates of costs, inspection, accounting, fiscal and legal expenses;
3. The cost of issuance of the bonds, including engraving, printing, advertising and other similar expenses;
4. Any interest costs during the period of construction of projects, and for not exceeding three years thereafter on money borrowed or estimated to be borrowed;
5. The proper proportionate amount of administrative costs of the board as may be determined.

(m) To exercise any power conferred by this act for the purpose of obtaining grants or loans, or both, from any federal agency pursuant to or by virtue of any and all acts of Congress, independently or in conjunction with any other power or powers conferred by this act or heretofore or hereafter conferred by any other law.

(n) To contract debts for the construction and operation of any system or project, to borrow money, and to issue its revenue bonds to finance such construction, and to provide for the rights of the holders of the bonds and to secure the bonds as herein provided.

(o) To accept from private owners deeds or other instruments of trust relating to land and to subdivide, improve and sell such lands.

(p) To investigate and select for settlement suitable areas of undeveloped lands in this state suitable for settlement.

(q) To make on any lands such improvements as may be necessary to render the same habitable and productive.

(r) To purchase and acquire lands in cooperation with the United States under such conditions as may be deemed advisable for the purpose of this act, and to convey the same under such conditions, terms and restrictions as may be approved by the board and the federal government or any of its authorized agencies.

(s) To purchase rights-of-way and pay construction costs in connection with any projects contemplated by this act either from its own funds or cooperatively with the federal government.

(t) To make investigations and surveys of natural resources and of opportunities for their conservation and development and pay the costs of the same either from its own funds or cooperatively with the federal government.

(u) To fix, maintain and collect fees, rents, tolls and other charges for service rendered.

(v) To appoint and fix salaries and duties of officers, experts, agents and employees as it deems necessary, to hold office during the pleasure of the board, as it may require.

(w) To perform any and all of the foregoing acts and to do any and all of the foregoing things under, through or by means of its own officers, agents and employees or by contract with any person, federal agency or municipal political subdivision of this state.

(x) To delegate to one or more of its members or its agents and employees such powers and duties as it may deem proper.

(y) To do any and all acts and things herein authorized or necessary to carry out the powers expressly given in this act, independently or in conjunction with any other power or powers conferred by this act or heretofore or hereafter conferred by any other law.

History: En. Sec. 4, Ch. 96, L. 1935.

59 C.J. States § 278; 67 C.J. Waters §§ 10, 411, 614, 856, 1119 et seq.

States 67, 86; Waters and Water Courses 217.

89-133. (349.30) Officers and employees of state may be utilized by federal government. The board is hereby authorized to consent that the president of the United States may utilize such state and local officers and employees of the state of Montana, and of its subdivisions, as the board may designate in effectuating the policies of the federal government in carrying out the provisions of the acts of Congress.

History: En. Sec. 5, Ch. 96, L. 1935.

89-134. (349.31) State officers to cooperate with board. The board is hereby authorized to require the assistance, cooperation and services of, and the use of the records and files in all the departments and institutions of the state, and all state officers and the governing authorities of all state institutions are hereby directed to cooperate with the board in furthering the purposes of this act.

History: En. Sec. 6, Ch. 96, L. 1935.

89-135. (349.32) Execution of instruments by board, manner of. All agreements, contracts, deeds, indentures, bonds or instruments necessary to be executed shall be executed in the name of the board by its chairman and attested by the secretary.

History: En. Sec. 7, Ch. 96, L. 1935.

89-136. (349.33) Power to issue revenue bonds—state not liable on bonds. The board shall have and is hereby given the authority to issue "Revenue Bonds" in accordance with the terms, provisions and conditions

of the act of the extraordinary session of the twenty-third legislative assembly (sections 89-101 to 89-128, inclusive), creating said board to which reference is hereby made and to the same effect as if herein fully written. Such bonds shall not be a debt, liability or obligation of the state of Montana, and shall be secured only by the revenue of such works or projects and the funds received from the sale or disposal of any such works or projects to be required out of the proceeds of such bonds.

History: En. Sec. 8, Ch. 96, L. 1935.

this code of the sections of this act referred to in the above section.

NOTE.—The sections in parentheses above are inserted to show the location in

89-137. (349.34) Additional and supplemental powers—proceedings heretofore taken by board. The powers conferred by this act shall be in addition and supplemental to the powers conferred by any other law and not in substitution for the powers conferred by any other law. Bonds may be issued hereunder for any project, system or works notwithstanding that any other law may provide for the issuance of bonds for like purposes and without regard to the requirements, restrictions or procedural provisions contained in any other law except the provisions of sections 89-101 to 89-128, inclusive. Any proceedings heretofore taken by the board relating to the subject matters of this act, whether or not commenced under any other law, may be continued under this act, or, at the option of the board, may be discontinued and new proceedings instituted under this act.

History: En. Sec. 9, Ch. 96, L. 1935.

89-138. (349.35) Purpose and construction of act. It is the purpose of this act to enable the state water conservation board to secure the benefits of the acts of Congress applicable thereto; to encourage public works, to reduce unemployment and thereby to assist in the national recovery and promote the public welfare, and to these ends the board shall have power to do all things necessary or convenient to carry out said purpose in addition to the power conferred in this act. This act is remedial in nature and the powers hereby granted shall be liberally construed.

History: En. Sec. 10, Ch. 96, L. 1935.

Statutes 179.

59 C.J. Statutes § 567.

89-139. (349.36) Preamble and purpose of act. Whereas, the state water conservation board is engaged in negotiations with the government of the United States for the construction of water conservation works within the state of Montana, and whereas, certain projects will be constructed by the state water conservation board of the state of Montana with funds to be advanced through agencies of the United States, and whereas, among the lands to be benefited by irrigation from said projects are included certain state lands and county lands, and it is desirable that such lands may receive the benefits therefrom.

History: En. Sec. 1, Ch. 97, L. 1935.

89-140. (349.37) State agencies and boards and counties authorized to contract with water conservation board. The state land board and/or the state board of examiners and/or the state board of education or any other board or agency of the state of Montana and/or boards of county commissioners having jurisdiction over any lands which may require the use of any

water or water rights owned or controlled by the state water conservation board or the United States or its agencies, are hereby authorized to enter into such contracts as are necessary with the state water conservation board, the United States, or agencies of the United States, or others, for the purchase of water or water rights needed for such lands, and may enter into any contracts as necessary or expedient, similar to contracts executed by individuals or others, to secure for the state, state institutions, counties and state school and county lands the benefits of such water or water rights, which obligations may be similar to those of persons who become stockholders in corporations or who may agree to purchase and pay for water for irrigation purposes, which agreements may include agreements that the state and counties shall be subject to the same charges and payments as are other water users within such projects, provided, however, that none of such charges, payments or costs shall constitute a lien against the state's interest in the said lands.

History: En. Sec. 2, Ch. 97, L. 1935.

Waters and Water Courses—254, 258.
67 C.J. Waters § 10 et seq.

References

Farmers' State Bank of Conrad v. City of Conrad, 100 M 415, 420, 47 P 2d 853.

89-141. (349.38) Nature of obligations. The obligations provided for in this act to be incurred upon behalf of the counties and the state shall not be in the nature of general obligations by either said counties or the state of Montana but shall constitute liens only upon such water or water rights purchased for the benefit of such lands.

History: En. Sec. 3, Ch. 97, L. 1935.

CHAPTER 2

ELECTRIFICATION AUTHORITY ACT, STATE

- Section 89-201. Short title.
89-202. Definitions.
89-203. Creation of state electrification authority—exercise of powers.
89-204. Powers of board.
89-205. Corporate purpose of the authority.
89-206. Grant of specific powers.
89-207. Bonds of the authority—power to issue—terms—sale—repurchase—temporary or interim obligations.
89-208. Validity of bonds.
89-209. Bonds of authority not debts of state.
89-210. Rates, amount of—expense and bonds to be paid from.
89-211. Agreement of the state not to limit or alter rights and powers of authority.
89-212. Security for bonds.
89-213. Rights and remedies of bondholders.
89-214. Assets to pass to state on ceasing of authority.
89-215. Act complete in itself.

89-201. (349.39) Short title. This act may be cited as the "State Electrification Authority Act."

History: En. Sec. 1, Ch. 98, L. 1935.

Cross-Reference

Rural electrification, sec. 14-501 et seq.

89-202. (349.40) Definitions. The following terms, whenever used in this act, shall have the following meanings, unless a different meaning clearly appears from the context:

(a) "Authority" shall mean the state water conservation board.

(b) "Bonds" shall mean and include negotiable bonds, interim certificates or receipts, notes, debentures and all other evidences of indebtedness either issued or the payment thereof assumed by the authority.

(c) "Acquire" shall mean and include construct, acquire by purchase, lease, devise, gift or the exercise of the right of eminent domain in the manner now or hereafter provided by law for the exercise thereof by the state, or other mode of acquisition.

(d) "Person" or "Inhabitant" shall mean and include natural persons, firms, associations, corporations, business trusts, partnerships and bodies politic.

(e) "Energy" shall mean and include any and all electric energy no matter how generated or produced.

(f) "System" shall mean and include any plant, works, system, facilities, or properties, together with all parts thereof and appurtenances thereto, used or useful in connection with the transmission or distribution of energy.

(g) "Law" shall mean any act or statute, general, special or local of the state.

(h) "State" shall mean the state of Montana.

(i) "Legislature" shall mean the legislative assembly of the state.

(j) "Municipality" shall mean any city or town of the state.

(k) "Federal Agency" shall mean and include the United States of America, the president of the United States of America, the Federal Emergency Administrator of Public Works, and any and all other authorities, agencies, and instrumentalities of the United States of America, heretofore or hereafter created.

(l) "Improve" shall mean and include construct, reconstruct, improve, repair, extend, enlarge or alter.

(m) "Service" shall mean and include the sale or other disposition of energy at the lowest cost consistent with sound economy, public advantage and the prudent conduct of the business of the authority.

History: En. Sec. 2, Ch. 98, L. 1935.

Electricity ~~§~~ 1.

29 C.J.S. Electricity §§ 2, 3.

89-203. (349.41) Creation of state electrification authority—exercise of powers. The state water conservation board is hereby created as the state electrification authority under the provisions of this act. The powers of said board shall be exercised by a majority of the members of the board then in office. The provisions of the sections 89-101 to 89-128, inclusive, shall govern the organization and compensation of the members of said board, except as otherwise herein provided.

History: En. Sec. 3, Ch. 98, L. 1935.

89-204. (349.42) Powers of board. The board shall have power to do all things necessary or convenient in conducting the business of the authority, including, but not limited to:

(a) The power to adopt and amend by-laws for the management and regulation of its affairs and the business in which it is engaged;

(b) To use, with the consent of a municipality, the agents, employees or facilities of such municipality and to provide for payment of the agreed proportion of the cost therefor;

(c) To appoint officers, agents and employees and to fix their compensation;

(d) To inquire into any matter relating to the affairs of the authority, to compel by subpoena the attendance of witnesses and the production of books and papers material to any such inquiry, to administer oaths to witnesses and to examine witnesses and such books and papers;

(e) To appoint an advisory board to assist in the formation of proper policies in respect to the business of the authority;

(f) To execute instruments;

(g) To delegate to one or more of its members, or to its agents and employees, such powers and duties as it may deem proper.

History: En. Sec. 4, Ch. 98, L. 1935.

89-205. (349.43) Corporate purpose of the authority. The corporate purpose of the authority is to encourage and promote the fullest possible use of energy by all of the inhabitants of the state by rendering service to said inhabitants, to whom energy is not available or, in the opinion of the board, is not available at reasonable rates.

History: En. Sec. 5, Ch. 98, L. 1935.

89-206. (349.44) Grant of specific powers. The authority shall have power:

(1) To sue and be sued.

(2) To have a seal and alter the same at pleasure.

(3) To render service to the inhabitants of the state and, by contract or contracts with any person, federal agency or municipality or by its own employees, to acquire, own, operate, maintain and improve a system or systems.

(4) To acquire, hold and dispose of property, real and personal, tangible and intangible, or interests therein, in its own name, subject to mortgages or other liens or otherwise and to pay therefor in cash or on credit, and to secure and procure payment of all or any part of the purchase price thereof on such terms and conditions as the board shall determine.

(5) To cause surveys to be made of areas throughout the state for the purpose of determining the economic soundness of the acquisition of a system or systems therein, to make plans and estimates of the cost of such system or systems and in connection therewith to enter on any lands, waters and premises for the purpose of making such surveys, soundings and examinations.

(6) To have complete control and supervision of the system or systems and to make such rules and regulations governing the rendering of service thereby as, in the judgment of the board, may be just and equitable.

(7) To fix, maintain and collect rates and charges for service.

(8) To construct or place any part or parts of a system or systems across, in or along any street or public highway, over any lands which are now or may hereafter be the property of the state or any political subdivision thereof without obtaining any franchise or other permit therefor. The authority shall, however, restore any such street or highway to its

former condition or state as near as may be and shall not use the same in a manner to unnecessarily impair its usefulness.

(9) To execute all instruments necessary or convenient, including, but not limited to, indentures of trust, leases, and bonds.

(10) To borrow money and issue negotiable bonds and to provide for the rights of the holders thereof.

(11) To accept gifts or grants of money or property, real or personal, and voluntary and uncompensated services from any person, federal agency or municipality.

(12) To make any and all contracts with any person, federal agency, municipality, unincorporated town or rural improvement district or authority necessary or convenient for the full exercise of powers herein granted, including, but not limited to, (a) contracts for the purchase or sale of energy, (b) contracts for the management and conduct of the business of the authority or any part thereof, and (c) contracts for the purchase or sale, lease or other disposition of water for the purpose of irrigation, watering of stock or any other purpose.

(13) To do any and all acts and things herein authorized or necessary or convenient to carry out the powers expressly given in this act under, through or by means of its own officers, agents and employees, or by contracts with any person, federal agency or municipality.

History: En. Sec. 6, Ch. 98, L. 1935.

89-207. (349.45) Bonds of the authority—power to issue—terms—sale—repurchase—temporary or interim obligations. The authority shall have power and is hereby authorized from time to time to issue its bonds in anticipation of its revenues, for any corporate purpose. Said bonds may be authorized by resolution or resolutions of the board, and may be issued in one or more series, may bear such date or dates, mature at such time or times not exceeding forty years from their respective dates, bear interest at such rate or rates, not exceeding six per centum per annum, payable semi-annually, be in such denominations, be in such form, either coupon or registered, be executed in such manner, be payable in such medium of payment, at such place or places, and be subject to such terms of redemption, with or without premium, be declared or become due before the maturity date thereof, as such resolution or resolutions may provide. Said bonds may be issued for money or property (at public or private sale for such price or prices) as the board shall determine, provided, that the interest cost to maturity of the money or property (at its value as determined by the board, the determination of which shall be conclusive) received for any issue of said bonds, shall not exceed six per centum per annum, payable semi-annually. Said bonds may be repurchased by the authority out of any available funds at a price not to exceed the principal amount thereof and accrued interest, and all bonds so repurchased shall be cancelled. Pending the preparation or execution of definitive bonds, interim receipts or certificates or temporary bonds may be delivered to the purchaser or purchasers of said bonds.

History: En. Sec. 7, Ch. 98, L. 1935.

States ~~§~~ 147 et seq.

59 C.J. States § 411 et seq.

89-208. (349.46) Validity of bonds. Said bonds bearing the signatures of officers in office on the date of the signing thereof shall be valid and

binding obligations notwithstanding that before the delivery thereof and payment therefor any or all the persons whose signatures appear thereon shall have ceased to be officers. The validity of said bonds shall not be dependent on nor affected by the validity or regularity of any proceedings relating to the acquisition or improvement of the system or systems for which said bonds are issued. The resolution or resolutions authorizing said bonds may provide that the bonds shall contain a recital that they are issued pursuant to this act, which recital shall be conclusive evidence of their validity and of the regularity of their issuance.

History: En. Sec. 8, Ch. 98, L. 1935.

States~~157~~.

59 C.J. States § 416.

89-209. (349.47) Bonds of authority not debts of state. No holder or holders of any bonds issued under this act shall ever have the right to compel any exercise of taxing power of the state or of any political subdivision thereof to pay said bonds or the interest thereon. Each bond issued under this act shall recite in substance that said bond, including the interest thereon, is payable from the revenue pledged to the payment thereof, and that said bond does not constitute a debt of the state.

History: En. Sec. 9, Ch. 98, L. 1935.

States~~152~~.

59 C.J. States § 415.

89-210. (349.48) Rates, amount of—expense and bonds to be paid from. The authority shall not be operated primarily as a source of revenue to the state. The authority shall, however, prescribe and collect reasonable rates, fees or charges for the services, facilities and commodities made available by it, and shall revise such rates, fees or charges from time to time whenever necessary so that the authority shall be and always remain self-supporting, and shall not require appropriations by the state to enable it to carry out its purpose. The rates, fees or charges prescribed shall be such as will produce revenue at least sufficient (a) to pay when due all bonds and interest thereon, for the payment of which such revenue is or shall have been pledged, charged or otherwise encumbered, including reserves therefor, and (b) to provide for all expenses of operation, maintenance or improvement of the system or systems acquired by the authority, including reserves therefor.

History: En. Sec. 10, Ch. 98, L. 1935.

Electricity~~11~~.

29 C.J.S. Electricity § 11.

89-211. (349.49) Agreement of the state not to limit or alter rights and powers of authority. The state does pledge to and agree with the holders of bonds issued by the authority that the state will not limit or alter the rights and powers hereby vested in the authority to fix and collect such rates, fees and charges as may be necessary or advisable in order to produce sufficient revenue to meet all expenses of maintenance and operation of its system or systems and to fulfill the terms of any agreements made with the holders of such bonds, or in any way impair the rights and remedies of the holders of such bonds, until such bonds together with interest thereon, and interest on any unpaid installments of interest, and all costs and expenses in connection with any suits, actions or proceedings by or on behalf of such bondholders are fully paid and discharged.

History: En. Sec. 11, Ch. 98, L. 1935. 29 C.J.S. Electricity § 11; 59 C.J. States § 415.
Electricity 11; States 152.

89-212. (349.50) Security for bonds. In connection with the issuance of bonds or in order to secure the payment of its bonds, the authority incorporated under this act shall have power:

(1) To pledge all or any part of its revenues.

(2) To vest in a trustee or trustees the right to enforce any covenant made to secure, to pay, or in relation to its bonds, to provide for the powers and duties of such trustee or trustees, to limit the liabilities thereof, and to provide the terms and conditions upon which the trustee or trustees or the holders of bonds or any amount or proportion of them may enforce any such covenant.

(3) To make such covenants and to do any and all such acts and things as may be necessary or convenient or desirable in order to secure its bonds or which, in the absolute discretion of the board, tend to make the bonds more marketable, notwithstanding that such covenants, acts and things may restrict or interfere with the exercise of the powers herein granted; it being the intention hereof to give the authority power to do all things in the issuance of bonds, and for their security, that a private business corporation can do under the general laws of the state.

History: En. Sec. 12, Ch. 98, L. 1935. States 152.
59 C.J. States § 415.

89-213. (349.51) Rights and remedies of bondholders. In addition to all other rights and all other remedies, any holders of bonds of the authority, including a trustee for bondholders, shall have the right by mandamus or other suit, action or proceeding, at law or in equity, to enforce his rights against the authority and the board of the authority, including the right to require the authority and such board to fix and collect rates and charges adequate to carry out any other covenants and agreements with such bondholder and to perform its and their duties under this act.

History: En. Sec. 13, Ch. 98, L. 1935. States 160, 162.
59 C.J. States § 424.

89-214. (349.52) Assets to pass to state on ceasing of authority. In the event that the authority shall cease to exist, all of its assets remaining after all of its obligations and liabilities have been satisfied or discharged shall pass to and become the property of the state.

History: En. Sec. 14, Ch. 98, L. 1935. Electricity 1.
29 C.J.S. Electricity §§ 1, 2, 4.

89-215. (349.53) Act complete in itself. This act is complete in itself and shall be controlling. The provisions of any other law, general, special, except as provided in this act, shall not apply to the authority created by this act.

History: En. Sec. 15, Ch. 98, L. 1935.

CHAPTER 3

STATE PLANNING BOARD FOR DEVELOPMENT OF WATER
AND OTHER RESOURCES

- Section 89-301. State planning board—policy, purpose and character.
 89-302. State planning board created.
 89-303. Advisory council may be appointed by board.
 89-304. Expense allowed advisory council.
 89-305. Rules—records—officers and employees.
 89-306. State officers or employees to assist board.
 89-307. State plan to be adopted—reports and recommendations of board.
 89-308. Public interest in plan to be promoted—cooperation with federal and state agencies.
 89-309. Encouragement of local planning bodies.

89-301. (349.54) State planning board—policy, purpose and character.

It is hereby declared that the public interest, welfare, convenience and necessity require the conservation and development of Montana's land, water, mineral, timber, coal, oil and other natural resources for the social and economic advancement of the people of the state in accordance with a comprehensive plan to be developed concurrently with regional and national plans now being formulated by national planning bodies in cooperation with the several states.

The state planning board, hereinafter created, shall be regarded as performing a governmental function in meeting this necessity whereby through the exercise of foresight, use of scientific knowledge and harmonizing all of the interests of the state, assistance may be given in solving the complex problems of Montana, thereby effecting more immediate stabilization of the agricultural, livestock, mining and other industries of the state and bringing about more efficient, economic and fuller use of the manifold resources of Montana.

The state planning board shall be regarded as an agency for encouraging the formation and activity of local and district planning bodies in the state whereby the people of the several municipalities, communities, counties or regions may assume the responsibility of developing plans and policies in cooperation with the state planning board, which board shall also be regarded as an agency to assist in putting all such plans and policies into actual operation.

History: En. Sec. 1, Ch. 176, L. 1935.

States ~~45~~.
59 C.J. States § 143½.

89-302. (349.55) State planning board created. There is hereby created a state planning board hereinafter referred to as the "board." The board shall consist of five members who shall be the same persons who compose the state water conservation board.

History: En. Sec. 2, Ch. 176, L. 1935.

89-303. (349.56) Advisory council may be appointed by board. The board may at its discretion appoint five or more citizens of the state, representative of the several areas of the state, as an advisory council which shall be advisory to the board and which shall effect contacts between the board and the people of the state through local planning bodies.

History: En. Sec. 3, Ch. 176, 1935.

States ~~45~~.
59 C.J. States § 118 et seq.

89-304. (349.57) Expense allowed advisory council. The members of the advisory council as provided for in section 89-303 shall serve without compensation but shall be entitled to actual and necessary expenses incurred in discharging of duties imposed upon them by the board.

History: En. Sec. 4, Ch. 176, L. 1935.

States 62.

59 C.J. States § 252.

89-305. (349.58) Rules—records—officers and employees. The board shall adopt rules for the transaction of its business and shall keep a record of its official actions. It shall annually select a chairman from its appointive members and a secretary who need not be a member of the board. The board may employ a director of planning who shall be qualified by special training, experience and demonstrated ability in the field of planning and may employ such other persons as may be necessary for its work.

History: En. Sec. 5, Ch. 176, L. 1935.

States 67.

59 C.J. States § 143.

89-306. (349.59) State officers or employees to assist board. Upon request of the board, the director of any state department or institution may from time to time assign or detail members of the staff or personnel of such department for the purpose of special surveys under the direction of the board, or may use the facilities of such department to make special surveys or studies requested by the board. The board may from time to time appoint technical or other advisory committees as needed in carrying out the purposes of this act.

History: En. Sec. 6, Ch. 176, L. 1935.

89-307. (349.60) State plan to be adopted—reports and recommendations of board. It shall be the function and duty of the state planning board to make and adopt a comprehensive plan for the physical development of the state of Montana and to make such related economic and social studies as may be needed in carrying out the purposes of this act. The state plan, with the accompanying maps, charts and descriptive matter shall show the recommendations of the board for the development of the state.

The board shall formulate policies for making effective any plan or plans adopted by the board or that may be necessary in carrying out the purposes of this act.

The board shall render an annual report to the governor and report and recommend to the governor, the legislature, or any state agency, or any political subdivision of the state on any matters relating to the state plan, or any phase of the state planning program.

The objectives of all plans or policies adopted or recommended by the board shall be in accordance with the purposes declared in section 89-301.

History: En. Sec. 7, Ch. 176, L. 1935.

States 67.

59 C.J. States §§ 118 et seq., 123 et seq.

89-308. (349.61) Public interest in plan to be promoted—cooperation with federal and state agencies. The board shall have power to promote public interest in an understanding of the state plan and the problem of state planning, and to that end may publish and distribute copies of the plan or any report relating thereto and may employ other lawful means of publicity and education. Through its members or its staff the board may

confer and cooperate with federal officials and with the executive, legislative or planning authorities of neighboring states or regions for the purpose of harmonizing the plans and policies of other state, regional and national planning bodies with the plans and policies adopted for Montana and for the purpose of bringing about a coordination between the development of such neighboring states or regions and the development of the state of Montana.

History: En. Sec. 8, Ch. 176, L. 1935. Application of compacts and statutes involving co-operation between states. 134 ALR 1411.
Constitutionality, construction, and ap-

89-309. (349.62) Encouragement of local planning bodies. The board, in its discretion, shall encourage the formation and activity of municipal, county, district and other local planning bodies within the state, shall render to them all assistance reasonably possible, and may adopt rules and regulations for its recognition of such local planning bodies in accordance with the needs and conditions of the various communities.

History: En. Sec. 9, Ch. 176, L. 1935. States 67.
59 C.J. States § 118 et seq.

CHAPTER 4

CONSERVATION REVOLVING FUND

- Section 89-401. Conservation revolving fund—moneys constituting.
89-402. Payment of expenses from fund.
89-403. State examiner to examine—report—public may inspect.

89-401. (349.63) Conservation revolving fund—moneys constituting. For the purpose of carrying out the provisions of the water conservation act, acts amendatory thereto and supplementary thereof, and such other authority, powers and duties as are conferred upon the water conservation board by law, there is hereby created a state reclamation revolving fund hereinafter designated the "conservation revolving fund," which shall consist of all moneys that may from time to time be appropriated thereto by the legislative assembly from other funds in the state treasury; all sums of money donated or contributed to said fund by the federal government and/or any departments or agencies thereof; all gifts, donations, bequests and devices made to the state therefor, and proceeds of the sale thereof; the proceeds of the sale or redemption of and the interest earned by the securities purchased or acquired by the moneys thereof; all reimbursements for money advanced for the payment of the assessments upon state, school granted and other public lands for the improvement thereof as provided by law; all reimbursements for money advanced for the investigation and survey of reclamation, electrification and rehabilitation systems or projects proposed to be financed in whole or in part by the reclamation of lands and dyking, drainage, and dyking and drainage dams for conservation of water to be used in reclamation of land or stock reservoirs or for the construction, maintenance and operation of plants or projects for the manufacture or distribution of electric current; revenues arising from projects constructed or owned by the board in excess of costs of operation and maintenance, and repayment of principal and interest of any moneys borrowed

for the construction of such projects; all sums payable as rentals due for water use, maintenance or operation upon any project owned by the state or for which such rentals are due and payable under any contract or agreement made by any person, association or corporation with the said board; all sums of money received by the board for the use of electric current, in excess of the maintenance and operation upon any electrification system or project; all reimbursements for costs of surveys and investigations for moneys advanced to counties, cities or towns or their proportion of the cost thereof, or from any other sources.

History: En. Sec. 1, Ch. 169, L. 1935.

State ex rel. Normile v. Cooney et al., 100 M 391, 397, 47 P 2d 637.

Operation and Effect

This section did not impliedly repeal ch. 35, laws of ex. sess. 1933-34 (89-101 et seq.) or ch. 95, laws of 1935 amending the same.

States—127.

59 C.J. States § 378.

89-402. (349.64) Payment of expenses from fund. From the moneys appropriated and credited to the "conservation revolving fund," there shall be paid, upon vouchers approved by the board, attested by the secretary, such sums as are found to be necessary or expedient for the investigation and survey of unreclaimed and undeveloped lands, to determine the relative agricultural value, productiveness, uses and feasibility and cost of the reclamation and development thereof; for the investigation and survey of electrification and rehabilitation systems and projects proposed to be financed in whole or in part by the board; such amounts as may be authorized by the board for the reclamation of lands by dyking, drainage, dyking and drainage and irrigation districts duly and regularly organized under the laws of this state and such other districts as shall from time to time be authorized by law for the reclamation or development of waste or undeveloped lands; such amounts as may be authorized by the board for the construction, maintenance and operation of dams and dykes for the conservation of water for reclamation projects or stock reservoirs, and purchase of rights-of-way and other costs preliminary to construction of reclamation, stock reservoirs, electrification or rehabilitation systems or projects authorized under the water conservation act or acts amendatory thereof or supplemental thereto, provided that whenever deemed practical the board may employ county surveyors in the assistance and preparation of surveys and investigations conducted by the board.

History: En. Sec. 2, Ch. 169, L. 1935.

Waters and Water Courses—222.
59 C.J. States § 378.

89-403. (349.65) State examiner to examine—report—public may inspect. The state examiner is hereby required strictly to examine and audit said conservation revolving fund and the fiscal operations of said water conservation board at least once each year, and report fully thereon, said report to be filed in the office of the secretary of state where the same shall be open to public inspection.

History: En. Sec. 7, Ch. 169, L. 1935.

States—76.
59 C.J. States § 123 et seq.

CHAPTER 5

PUBLIC WATERS

Section 89-501. What waters are public ways.

89-501. (1604) What waters are public ways. Navigable waters and all streams of sufficient capacity to transport the products of the country are public ways for the purposes of navigation and such transportation; provided, that this act shall not be so construed as to in any manner affect or impair any rights acquired prior to its passage by any person, association of persons, or corporation; and provided, further, that the right of any person, association of persons, or corporation shall not be abridged to take and use any water as now provided by law from any stream or streams for the purpose of irrigation, or any beneficial or industrial pursuit.

History: En. Sec. 2570, Pol. C. 1895; amd. Sec. 1, p. 126, L. 1901; re-en. Sec. 1326, Rev. C. 1907; re-en. Sec. 1604, R. C. M. 1921. Cal. Pol. C. Sec. 2348.

Overflowing ditches or flumes, penalty, sec. 94-3565.

Poisoning waters, sec. 94-35-255.

Taking water from or obstructing canals, sec. 94-3204.

Cross-References

Depositing slack in waters, secs. 94-3551, 94-3552.

Defiling waters, sec. 94-3542.

Navigable Waters↔1(1).

45 C.J. Navigable Waters § 12 et seq.

CHAPTER 6

PUBLIC DOCKS AND WHARVES

Section 89-601. Who may build wharves and docks—proviso.

89-602. Public use of wharves and docks—charges.

89-603. Revocation of license.

89-604. Land under navigable water.

89-605. Jurisdiction of railroad commission.

89-601. (1605) Who may build wharves and docks—proviso. Any person or persons owning land bordering upon any of the navigable waters within the state of Montana, are hereby granted a license and permit to build docks and wharves over, across, and upon the “lands under water” belonging to the state of Montana; provided, however, that such docks and wharves shall be extended out into such navigable water such distance only as may be necessary to permit any and all boats, steamboats, and vessels to safely land thereat, and discharge and take on its or their cargoes and passengers.

History: En. Sec. 1, Ch. 38, L. 1909; re-en. Sec. 1605, R. C. M. 1921.

Wharves↔7.

68 C.J. Wharves § 5 et seq.

89-602. (1606) Public use of wharves and docks—charges. All docks and wharves built on any of the navigable waters of the state shall be public docks and wharves, and all boats, vessels, and steamboats plying such navigable waters shall have a right to land thereat, and take on and discharge its or their cargoes and passengers thereon; provided, however, the owner of such dock or wharf shall have the right to charge and collect from the owner or owners of such boat, steamboat, or vessel a reasonable compensation therefor.

History: En. Sec. 2, Ch. 38, L. 1909; re-en. Sec. 1606, R. C. M. 1921.

Wharves↔10.

68 C.J. Wharves § 22 et seq.

89-603. (1607) Revocation of license. The license granted in section 89-601 to build docks and wharves over and upon the lands under the navigable waters of this state conveys no title in such lands, and such license may be revoked by the state of Montana at any time.

History: En. Sec. 3, Ch. 38, L. 1909; Wharves⇒7.
re-en. Sec. 1607, R. C. M. 1921. 68 C.J. Wharves § 66.

89-604. (1608) Land under navigable water. By the term "land under water" is meant all land under any navigable waters of this state, extending from high-water mark, or from the meander line where the shores of lakes or streams have been meandered, to the lake or stream.

History: En. Sec. 4, Ch. 38, L. 1909; Wharves⇒5 et seq.
re-en. Sec. 1608, R. C. M. 1921. 68 C.J. Wharves § 4.

89-605. (1609) Jurisdiction of railroad commission. The railroad commission of this state shall have jurisdiction over all docks and wharves within the state, and have full power to regulate, determine, and fix all dockage and wharfage fees.

History: En. Sec. 5, Ch. 38, L. 1909; Wharves⇒12.
re-en. Sec. 1609, R. C. M. 1921. 68 C.J. Wharves § 19.

CHAPTER 7

DAMS AND RESERVOIRS—CONSTRUCTION AND EXAMINATION OF

- Section 89-701. Dams and reservoirs—how constructed.
89-702. Dams and dikes to be constructed in a secure manner—proceedings upon complaint of insecurity.
89-703. Complaint against filling unsafe reservoir—duty of court to order examination.
89-704. Examination and report.
89-705. Withdrawal of water from unsafe structure.
89-706. Proceedings when dam or reservoir is insecure.
89-707. Issues and trial.
89-708. Judgment.
89-709. New trial and appeal.
89-710. Water may be drawn off pending an appeal.
89-711. Board of county commissioners may appoint experts to examine dam.
89-712. Compensation of experts.
89-713. Duty of board when complaint filed.
89-714. Penalties.

89-701. (2658) Dams and reservoirs—how constructed. No person must fill, or procure to be filled with water, any reservoir which is not so thoroughly and substantially constructed as to safely hold any water that may be turned therein.

History: Sec. 2138, Rev. C. 1907; re-en. Sec. 2658, R. C. M. 1921.

Cross-Reference

Fish ladders may be required at dams, sec. 26-104.

NOTE.—Sections 89-701 to 89-714, are here given as they appear in sections 2138 to 2151, revised codes of 1907 as amended; being sections 3440 to 3453, political code of 1895. Earlier acts very similar in substance were sections 1 to 6, p. 221, laws of 1877, re-enacted as sections 493 to 498, 5th division revised statutes of 1879 and as sections 983 to 988, 5th division comp. statutes of 1887.

Measurement of Water in Reservoir

Devices for measuring the water in a storage reservoir should be such that at a glance any one may tell the exact number of acre feet therein at any time, thus obviating the necessity of calling in engineers or others to measure it; the details of operation, presenting as they do, rather

a practical or engineering problem than a judicial one, should properly be left to the parties interested, and if the court's intervention or assistance be required in that behalf, a motion for modification of the decree should answer the purpose. *Federal Land Bank v. Morris*, 112 M 445, 457, 116 P 2d 1007.

Operation and Effect

Held, that under sections 89-701 to 89-714, reservoirs may be constructed for the purpose of storing flood water, in the course or at the headwaters of an adjudicated stream, provided their construction does not interfere with the use by prior appropriators of the natural flow in the stream to the extent of their appropriations. *Donich et al. v. Johnson et al.*, 77 M 229, 240, 250 P 963.

Rights of Person Reservoiring Water

Briefly epitomized, the rights of a person to reservoir water are as follows: He may,

in any one year store for use in that or succeeding years what he has a right to use, and also any additional amounts which others would not have the right to use and which otherwise would go to waste. The appropriation and use of water, as well as the sites for reservoirs for collecting it, constitute a public use under art. III, sec. 15 constitution it being to the interest of the public that water be conserved rather than permitted to be wasted, that arid lands may be made productive. *Federal Land Bank v. Morris*, 112 M 445, 453, 116 P 2d 1007.

References

Cited or applied as section 2138, revised codes, in *Frederick v. Hale*, 42 M 153, 168, 112 P 70.

Waters and Water Courses—159 et seq.
67 C.J. Waters §§ 356 et seq., 364 et seq.
56 Am. Jur. 625, Waters, §§ 156 et seq.

89-702. (2659) Dams and dikes to be constructed in a secure manner—proceedings upon complaint of insecurity. No person, association, or corporation shall construct, or cause to be constructed, a dam or dike for the purpose of accumulating, storing, appropriating, or diverting any of the waters of this state, except in a thorough, secure, and substantial manner.

Upon complaint on oath being made to the state engineer by three or more persons residing or having property in such location, that their homes or property would be in danger of destruction or damage in event of flood occurring on account of the breaking of any dam or dike of any reservoir within the state, and that they have reason to believe said reservoir is in an unsafe condition, or that it is being filled with water to such an extent as to render it unsafe, it shall be the duty of the state engineer to forthwith examine, or cause to be examined, the said reservoir. If, upon such examination, the state engineer shall find that said reservoir is unsafe, or is being filled with water to such an extent as to render it unsafe, it shall be his duty to notify the county attorney of the county in which the reservoir is located, setting forth his findings, and the county attorney shall immediately take the necessary steps to abate the danger and make the structure safe.

In the event of either party being dissatisfied with the findings of the state engineer, he may take an appeal to the district court of the district wherein the reservoir is located, and said court shall hear and determine the matter at the earliest practical time, subject to the right of either party to take an appeal as in other civil cases; provided, that the judgment of the state engineer shall control until the final determination of the case.

History: Sec. 2139, Rev. C. 1907; amd. Sec. 1, Ch. 168, L. 1917; re-en. Sec. 2659, R. C. M. 1921.

codes, before amendment, in *Frederick v. Hale*, 42 M 153, 168, 112 P 70; *Donich et al. v. Johnson et al.*, 77 M 229, 240, 250 P 963.

References

Cited or applied as section 2139, revised

89-703. (2660) Complaint against filling unsafe reservoir—duty of court to order examination. Upon complaint on oath made by any person or persons, and filed in the district court, that a person, association, or corporation is filling or proposing to fill with water a reservoir, or has filled or gathered water in a reservoir, and that life and property are thereby endangered, the judge must appoint three disinterested persons, at least one of whom must be a resident of the county in which the dam or reservoir is situated, and one of whom must be a competent and experienced civil or hydraulic engineer, each of whom must take an oath that he will examine the dam and reservoir to determine as to its security to the best of his ability.

History: Sec. 2140, Rev. C. 1907; amd. Sec. 2, Ch. 168, L. 1917; re-en. Sec. 2660, R. C. M. 1921.

89-704. (2661) Examination and report. It is the duty of the persons so appointed to make a thorough examination of the dam or reservoir, and if, upon examination, they find that persons or property are endangered by reason of the dam or reservoir, and it is not secure against the pressure of the water confined therein, or the water that may be confined therein, or against rains and freshets that may occur, and if they find that the same is secure against the occurrence of the casualties mentioned, or any of them, they must make a report in writing to the judge, which must be entered of record as a proceeding in court.

History: Sec. 2141, Rev. C. 1907; re-en. Sec. 2661, R. C. M. 1921.

89-705. (2662) Withdrawal of water from unsafe structure. If, upon such examination as to the safety of such reservoir, they consider such reservoir insufficient and insecure, they must further inquire whether the danger to be apprehended is imminent, and if they are of the opinion that such danger is imminent, and that destruction of life or property may result from delay, it is their duty forthwith to draw from such reservoir the waters therein, or so much thereof as will insure safety, and they must make return of their action to the judge; and in the discharge of such duties, the persons so acting are peace officers.

History: Sec. 2142, Rev. C. 1907; re-en. Sec. 2662, R. C. M. 1921.

89-706. (2663) Proceedings when dam or reservoir is insecure. If, upon examination, they are of opinion that such dam or reservoir is insecure and insufficient, but that the danger therefrom is not immediate or imminent, they must so state in their report to the judge, who must thereupon cause a copy of the report to be served on the owner or person in charge thereof, with a notice requiring him to make the same secure, or to draw the water therefrom without delay; and unless such order is complied with after hearing, the judge may order the sheriff to draw from said dam or reservoir the waters thereof.

History: Sec. 2143, Rev. C. 1907; re-en. Sec. 2663, R. C. M. 1921. For earlier history, see Sec. 89-701.

89-707. (2664) Issues and trial. The owner of the dam or reservoir may answer the complaint, and an issue may be joined at the hearing, and the question of the security and sufficiency of the dam or reservoir may be tried before the court or jury as in other cases.

History: Sec. 2144, Rev. C. 1907; re-en.
Sec. 2664, R. C. M. 1921.

89-708. (2665) Judgment. If the jury find the dam or reservoir insufficient or insecure, judgment must be entered thereon, declaring such dam or reservoir a nuisance, and that all the water be drawn therefrom. Costs may be taxed as in other cases to the losing party.

History: Sec. 2145, Rev. C. 1907; re-en.
Sec. 2665, R. C. M. 1921.

89-709. (2666) New trial and appeal. Any party to the proceedings may move for a new trial and appeal as in other cases.

History: En. Sec. 2146, Rev. C. 1907;
re-en. Sec. 2666, R. C. M. 1921.

89-710. (2667) Water may be drawn off pending an appeal. The judge may, after the verdict of the jury, and pending an appeal, order that the water be drawn from the reservoir so as to make the same secure and safe until the final determination of the proceedings.

History: En. Sec. 2147, Rev. C. 1907;
re-en. Sec. 2667, R. C. M. 1921.

89-711. (2668) Board of county commissioners may appoint experts to examine dam. Whenever any person is constructing a dam or reservoir, and complaint is made to the board of county commissioners that the same is being built in an insecure and unsafe manner, and dangerous to life or property, or that when constructed will be insecure and dangerous, it is the duty of the board to appoint three experts under whose supervision the dam or reservoir must be constructed, and such reservoir must not be filled with water, nor shall any water be allowed to flow therein, until the owner thereof has filed in the office of the county clerk a certificate, signed by a majority of the persons so appointed, to the effect that such dam or reservoir is constructed in a proper manner and is safe and secure.

History: En. Sec. 2148, Rev. C. 1907;
re-en. Sec. 2668, R. C. M. 1921.

89-712. (2669) Compensation of experts. The persons acting as experts are entitled to a reasonable compensation for their services, to be allowed by the board and paid by the owners of the dam or reservoir.

History: En. Sec. 2149, Rev. C. 1907;
re-en. Sec. 2669, R. C. M. 1921.

89-713. (2670) Duty of board when complaint filed. Whenever such complaint is made to the board of commissioners, it is the duty of the board, in case such dam or reservoir is not being constructed in a safe and secure manner, to proceed against the owner or persons constructing the same, in the manner provided for in this chapter, and any person may file a complaint

and proceed against any such owner of or person constructing such dam or reservoir, as provided in this chapter.

History: En. Sec. 2150, Rev. C. 1907;
re-en. Sec. 2670, R. C. M. 1921.

89-714. (2671) Penalties. Any person violating any of the provisions of this chapter is punishable as provided in section 94-35-105, and if death ensue by reason of any of the acts prohibited by this chapter, the person guilty of the same may be convicted of murder, manslaughter, or any other felony, as the case may be.

History: En. Sec. 2151, Rev. C. 1907;
re-en. Sec. 2671, R. C. M. 1921.

CHAPTER 8

WATER RIGHTS—APPROPRIATION AND ADJUDICATION

- Section 89-801. What waters may be appropriated.
89-802. Appropriation must be for a useful purpose—abandonment.
89-803. Point of diversion may be changed—change of use.
89-804. Water may be turned into natural channels and reclaimed.
89-805. Return of surplus water to stream.
89-806. Diversion of natural flow of waters, when permitted.
89-807. First in time, first in right.
89-808. Appropriation by United States.
89-809. Procedure for reciprocal appropriation of waters by Montana and Wyoming.
89-810. Notice of appropriation.
89-811. Diligence in appropriating.
89-812. Effect of failure.
89-813. Record of declaration.
89-814. Record prima facie evidence.
89-815. Rights settled in one action.
89-816. Record of declarations and notices.
89-817. Measurement of water—cubic foot.
89-818. Miner's inch equivalent in gallons.
89-819. Not to affect existing decrees.
89-820. Right to construct dams and raise water—conducting water over lands and railroad rights-of-way.
89-821. Highways to be protected.
89-822. Penalty for violating preceding section.
89-823. Owners of water to sell surplus.
89-824. Duty of purchaser to dig ditches.
89-825. Enforcement of right to surplus.
89-826. Purchaser cannot sell.
89-827. Use of insecure reservoir forbidden.
89-828. Dams and reservoirs to be securely constructed.
89-829. Procedure for appropriating waters of adjudicated streams.
89-830. Summons—issuance and service.
89-831. Appearance—default—decree.
89-832. Decree subject to prior adjudicated rights.
89-833. Scope of decree—diversion of waters to another stream.
89-834. Decree to govern conditions of performance of work.
89-835. Adjudicating rights of persons not party to decree.
89-836. Penalty for wrongful diversion of adjudicated waters.
89-837. Penalty for noncompliance with act.
89-838. Recording copy of final decree.
89-839. Effect of decree upon subsequent appropriations.
89-840. Appropriations of water subject to prior decrees adjudicating rights.
89-841. Nonadjudicated streams not affected.
89-842. Appropriations pending litigation subject to decree.
89-843. Statutory measurements.
89-844. Effect of decree.

- 89-845. United States may take ditches by right of eminent domain.
- 89-846. Appropriation of waters for use out of state—regulation.
- 89-847. Declaration of policy as to adjudication of waters of the state.
- 89-848. State engineer may bring action to adjudicate waters.
- 89-849. Appointment of referee to take testimony.
- 89-850. Notice of application for appointment of referee.
- 89-851. Duties of state engineer—scope of examination of streams—surveys, reports, maps and plans may be introduced as evidence.
- 89-852. Hearings by referee.
- 89-853. Report of referee—recognition of decreed water rights.
- 89-854. District court procedure.
- 89-855. Judgment.

89-801. (7093) What waters may be appropriated. The right to the use of the unappropriated water of any river, stream, ravine, coulee, spring, lake, or other natural source of supply may be acquired by appropriation, and an appropriator may impound flood, seepage, and waste waters in a reservoir and thereby appropriate the same.

History: Ap. p. Sec. 1, p. 130, L. 1885; re-en. Sec. 1250, 5th Div. Comp. Stat. 1887; amd. Sec. 1880, Civ. C. 1895; en. Sec. 1, p. 152, L. 1901; re-en. Sec. 4840, Rev. C. 1907; amd. Sec. 1, Ch. 228, L. 1921; re-en. Sec. 7093, R. C. M. 1921. Cal. Civ. C. Sec. 1410.

NOTE.—For history of law of water rights in this state, see *Bailey v. Tintinger*, 45 M 155, 122 P 575.

Appropriation Made on Public Domain by Settler

A settler on lands which were a part of the public domain could make a valid appropriation of water thereon. *Galahan v. Lewis*, 105 M 294, 300, 72 P 2d 1018.

Appropriation on Indian Lands

By the treaty of May 7, 1868, between the United States and the Crow Indians, establishing the Crow Indian Reservation, the federal government impliedly reserved to itself the waters thereon for irrigation and other purposes for use by the Indians, hence they were not subject to appropriation by others. The right to use water appurtenant to lands on an Indian reservation and held by Indians under trust patents, is property of the United States, and state courts are without jurisdiction to enter a decree affecting such right, but when Indian becomes seized of fee simple title after removal of trust patent, conveyance of land transfers the right to use the water appurtenant to the land. *Anderson v. Spear-Morgan Livestock Co.*, 107 M 18, 25, 26, 79 P 2d 667.

As against the contention that an appropriation of a water right was made on Indian lands prior to opening for settlement and therefore initiated by trespass and hence null and void, held, that the provision of the Crow Indian treaty of 1868 that white men should be excluded from Indian lands is directory and not

mandatory, and means whites could be excluded if inimical to Indian welfare, it being discretionary with those charged with protecting Indian rights to take action against whites invading without consent of the tribe, and the land became public domain subject to squatter's rights after ratification of agreement for settlement in 1891. *Cook v. Hudson*, 110 M 263, 285, 103 P 2d 137.

Appropriation on Private Land

This section and the following ones do not and cannot authorize a person to go upon the private property of another for the purpose of making an appropriation, except by condemnation proceedings. *Prentice v. McKay*, 38 M 114, 117, 98 P 1081.

Id. This section and the following ones apply only to appropriations made on the public lands of the United States or of the state, and to such as are made by individuals who have riparian rights, either as owners of riparian lands or through grants from such owners. See *Alaska Juneau Gold Min. Co. v. Ebner Gold Min. Co.*, 239 Fed. 638, 645.

The mere fact that water has its source on land owned by a plaintiff does not of itself give him the exclusive right therein so as to prevent others from acquiring rights to it under the laws of the state. *Quinlan v. Calvert*, 31 M 115, 119, 77 P 428.

An appropriation of water is not confined to waters flowing in streams upon public land, but may be made from a stream flowing through privately owned land by invoking the aid of eminent domain proceedings, if necessary. *Mettler v. Ames Realty Co.*, 61 M 152, 201 P 702.

Appropriator Not Owner of Water; Sale of Water

An appropriator of water does not become the owner thereof but only of the

right to use it; he may not sell the water to another to be used by the purchaser when not in use by the appropriator. *Galahan v. Lewis* 105 M 294, 300, 72 P 2d 1018.

Change in Manner and Place of Use—Swimming Pool, Basis for Appropriation

Diversion of water to maintain a swimming pool or fish pond may have been for a beneficial use and hence the basis of a valid appropriation. *Osnes Livestock Co. v. Warren*, 103 M 284, 302, 62 P 2d 206.

Contractual Relation or Privity

The rule that where the possessor of water right claims the right as of the date on which it was initiated by another he must show some contractual relation or privity between himself and such other, held not modified to the extent of holding that the possessor of the land may be presumed to be the owner of the right, by the decision in *Wills v. Morris* (100 M 514, 50 P 2d 862). *Osnes Livestock Co. v. Warren*, 103 M 284, 290, 62 P 2d 206.

Conveyance of Right as Appurtenance

When land is conveyed including the appurtenances, any water rights theretofore enjoyed are thereby transferred; and the fact that the grantor later purports to convey the water right only, the latter deed does not constitute severance of the water right, as it adds nothing to the conveyance theretofore made. *Osnes Livestock Co. v. Warren*, 103 M 284, 303, 62 P 2d 206.

General Provisions

The method to be pursued by the intending appropriator proceeding under the statute, has not been changed since the original act of 1885 went into effect. *Bailey v. Tintinger*, 45 M 154, 167, 122 P 575.

Id. This statute provides all the steps necessary to be taken by one seeking to make an appropriation of water, and one who proceeds under it, instead of under the rules and customs of the early settlers, has a completed appropriation when the work on his ditch or canal is finished, and before the water is actually applied to its intended use.

The essential features of an appropriation of water made prior to Laws of 1885, page 130, were a completed ditch and the application of water to a beneficial use. *Maynard v. Watkins*, 55 M 54, 56, 173 P 551.

Ownership of Land Where Water Has Source

Referring to seepage water which has its rise along the bed of a stream and forms a natural accretion thereto, held, that the ownership of land where water has its

source does not necessarily give the exclusive right to use such water to the landowner so as to prevent others from acquiring rights therein. *Woodward v. Perkins*, 116 M 46, 53, 147 P 2d 1016.

Prescription—Adverse User—Burden of Proof

To establish acquisition of a water right by adverse user or prescription, the claimant has the burden of showing that his use of the water deprived the prior appropriator of water at times when the latter actually needed it. *Osnes Livestock Co. v. Warren*, 103 M 284, 295, 62 P 2d 206.

Property Right

Where a water right has once been fully perfected, i.e., where there was a diversion of the water and its application to a beneficial use, it becomes a property right of which the owner may be divested only in some legal manner. *Osnes Livestock Co. v. Warren*, 103 M 284, 294, 62 P 2d 206.

Public Service Corporation

A public service corporation, organized for the purpose of constructing an irrigation system and selling or renting water to reclaim arid lands, has a completed appropriation of water when its distributing system is finished, and when the corporation is ready to deliver water to users upon demand, and offers to do so. *Bailey v. Tintinger*, 45 M 154, 177, 122 P 575.

Right of a Trespasser

A trespasser on riparian land cannot lawfully exercise there any right to such water or acquire any right therein by virtue of the provisions of this chapter. *Smith v. Denniff*, 24 M 20, 22, 60 P 396; *Prentice v. McKay*, 38 M 114, 117, 98 P 1081.

Rights of Cotenants; Conveyance of Right of One

As against third persons, a tenant in common has the possessory right of an absolute owner of the whole of a water right, including the right to preserve the right held in common; if he uses all the water, only his cotenant may object, and if he conveys his interest, a stranger is in no position to object if the grantee uses all of the water. *Osnes Livestock Co. v. Warren*, 103 M 284, 291, 62 P 2d 206.

Right to Use Increased Supply Personally Accomplished

Where one claims to have increased the flow of water in a stream and therefore entitled to use such increase, he must show that increase was occasioned through his exertions, any accessions to the stream brought about through the process of na-

ture, as by percolating or seepage waters which would have found their way to the stream in any event, collected in a drain ditch, not constituting a new supply. *West Side Ditch Co. v. Bennett*, 106 M 422, 433, 78 P 2d 78.

Rules and Customs Prior to 1885 Statutes

Prior to the adoption of the first water right statutes in 1885, appropriations of water were made pursuant to the rules and customs of the early California settlers, and under them the essential elements of an appropriation made in 1871 were a completed ditch and the application of the water through it to a beneficial use. *Missoula Light & Water Co. v. Hughes*, 106 M 355, 368, 77 P 2d 1041.

Seepage and Waste Waters

Prior to the enactment of this section (Ch. 228, Laws of 1921), there was no statutory provision for the appropriation of flood, seepage and waste waters, and therefore no right could be acquired as to such vagrant or fugitive waters as against the owner who sought to recapture them, but where they had passed beyond control of the owner they became abandoned personalty which could be taken up and used by the person first in the field. *Popham v. Holloron*, 84 M 442, 449, 275 P 1099.

While waste waters are subject to appropriation, the owner of the land from which such waters flow has the right to use his land as he pleases and may therefore change the flow to suit his purpose, provided the change be not made maliciously or arbitrarily to the detriment of the appropriator in the enjoyment of his right. *Newton v. Weiler*, 87 M 164, 179, 286 P 133.

Seepage water which has its rise along the bed of a stream and forms a natural accretion thereto belongs to the stream as a part of its source of supply, the same as do feeder springs, and an appropriator of water on such stream has the right to all such tributary flow even as against the owner of the land; held, that conducting water from upper reaches of tributary to "potholes" and "reservoirs" and then capturing the seepage therefrom in ditches, is insufficient proof of creating a new supply for an additional water right. *Woodward v. Perkins*, 116 M 46, 53, 147 P 2d 1016.

Source of Right

An appropriator of water derives his right from the state and not from the national government, the use of waters flowing in natural streams in Montana being subject to state regulation and control. *Mettler v. Ames Realty Co.*, 61 M 152, 201 P 702.

Storage and Use of Flood or Waste Water

Under art. III, sec. 15, constitution, the sites for reservoirs for collecting and storing water constitute a public use, to conserve rather than waste water that the arid lands of the state may be made productive. The appropriation of water in a reservoir to conserve water flowing in an otherwise dry coulee, only at heavy rains or spring run-off, entitles the owner to fill the reservoir to its full capacity to the extent of his appropriation, only once a year, the state laws applying to acquisition of running water applying to storage and use of flood or waste water—first in time, first in right. *Federal Land Bank v. Morris*, 112 M 445, 453, 116 P 2d 1007.

Title Obtained by Appropriation

Title cannot be acquired to the corpus of waters flowing in a stream, but only to the use thereof. *Norman v. Corbley*, 32 M 195, 202, 79 P 1059.

"Tributary," What Does Not Constitute

Evidence in a water right suit that water flowed in a creek only in times of flood and that, except at such times, the water therein never reached the point where it joined another creek, a finding that the former was a tributary of the latter, held not justified. *Anderson v. Spear-Morgan Livestock Co.*, 107 M 18, 29, 79 P 2d 667.

Watercourse Defined

Where waters flowing in a channel with regularity from year to year were made to do so through the instrumentality of man and have through years of so flowing acquired a permanent character as the natural drainage of the watershed, or where they come from springs formed from seepage or percolation, or surface water collecting in a canyon, or from wells accidentally developed while drilling for oil, etc., they constitute a watercourse. *Popham v. Holloron*, 84 M 442, 449, 275 P 1099.

A "watercourse," within the meaning of the water right laws, from which an appropriation for purposes of irrigation may be made, may consist of a well-defined channel into which water from a slough fed by irrigation of adjoining lands through seepage or through a ditch constructed by the owners of such lands for draining purposes finds its way, and which water through years of so flowing has acquired a permanent character as the natural drainage of the particular watershed. *West Side Ditch Co. v. Bennett*, 106 M 422, 431, 78 P 2d 78.

Where water seeping from irrigated lands finds its way into a drain ditch and

is collected there, it is subject to appropriation. *Wills v. Morris*, 100 M 514, 534, 50 P 2d 862.

Water Rights and Ditches Separate Rights

Water rights and ditch rights are separate and distinct property rights, i.e., one may own a water right without a ditch right, or a ditch right without a water right. *Connolly v. Harrel*, 102 M 295, 300, 57 P 2d 781.

Water Right in Gross; Subject of Transfer

A water right in gross (akin to an easement in gross) resulting from a conveyance thereof after the desert land entry upon which the water was being used had been canceled, thus rendering the water right nonappurtenant to the land, is a proper subject of transfer. *Osnes Livestock Co. v. Warren*, 103 M 284, 292, 62 P 2d 206.

Water Right Is Personal Property When Considered Independently of Land

While a water right partakes of the nature of real estate, it is not land in any sense, and when considered alone for the purpose of taxation, and independently of the land to which it is appurtenant, it is personal property. *Brady Irrigation Co. v. Teton County*, 107 M 330, 333, 85 P 2d 350.

When Burden Upon Subsequent Storage Claimant, or Distributor to Disprove Interference

Primary rights to the use of water in a stream are those of appropriators of its natural flow, and the burden is upon a

subsequent storage claimant (in the instant case defendant state water conservation board), or of one who uses a water course as part of his distribution system of developed or alien waters, affirmatively to disprove interference with prior rights in a suit to enjoin such interference. *Allendale Irrigation Co. v. State Water Conservation Board*, 113 M 436, 440, 127 P 2d 227.

When Licensee, Not Trespasser, Going Upon Land of Another to Appropriate Water

Where one goes upon land of another with the latter's verbal consent for the purpose of making an appropriation of water, posts his notice of appropriation, diverts the water through the landowner's ditch and applies it to a beneficial use on his own land, he becomes a licensee, not a trespasser, and revocation of license to construct ditch does not necessarily affect licensee's right to the water carried by the ditch. *Connolly v. Harrel*, 102 M 295, 300, 57 P 2d 781.

References

Cited or applied as section 1880, Civil Code, before amendment, in *Power v. Switzer*, 21 M 523, 529, 55 P 32; *Smith v. Denniff*, 24 M 20, 22, 60 P 398; *City of Helena v. Rogan*, 26 M 452, 477, 68 P 798; *Chessman v. Hale*, 31 M 577, 583, 79 P 254; *Sain v. Montana Power Co.*, 84 F. 2d 126.

Waters and Water Courses—2-33, 127, 152.

67 C.J. *Waters* §§ 412 et seq., 415, 696, 722.

56 Am. Jur. 741, *Waters*, §§ 291 et seq.

89-802. (7094) Appropriation must be for a useful purpose—abandonment. The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest abandons and ceases to use the water for such purpose, the right ceases; but questions of abandonment shall be questions of fact, and shall be determined as other questions of fact.

History: En. Sec. 2, p. 131, L. 1885; re-en. Sec. 1251, 5th Div. Comp. Stat. 1887; re-en. Sec. 1881, Civ. C. 1895; re-en. Sec. 4841, Rev. C. 1907; re-en. Sec. 7094, R. C. M. 1921. Cal. Civ. C. Sec. 1411.

"Abandonment"

Before it may be said that the owner of a water right has abandoned it, there must be the necessary concurrence of act and intent to abandon; he must have relinquished it because he no longer desired to possess it. *Irion v. Hyde*, 107 M 84, 91, 81 P 2d 353.

Acquisition by Adverse User or Prescription

In order to acquire a water right by adverse user or prescription the proof must show all the following elements: That the use has been continuous for ten years (See sec. 93-2513), exclusive, open, under a claim of right, hostile, and an invasion of another's rights which the latter had a chance to prevent; permissive use negatives possibility of adverse user; the burden of proving an adverse user rests upon the party alleging it. *Irion v. Hyde*, 107 M 84, 88, 81 P 2d 353.

Adverse User, What Constitutes

The claim of adverse user of a water right cannot be initiated until the owner of the superior right is deprived of the benefit of its use in such a substantial manner as to notify him that his rights are being invaded; mere use of the water during the statutory period alone is not sufficient, but it must appear that during such entire period an action could have been maintained against the claimant by the party against whom it is made. *Irion v. Hyde*, 107 M 84, 94, 81 P 2d 353.

Claimant Must Be Able to Use Water Before He May Object to the Use by Others

Until a claimant is himself in a position to use the water of a stream subject to appropriation, the right to the water or water right does not exist in such sense that the mere diversion of the water by another is a ground of action either to recover the water, or for damages for its diversion. *Miles v. Butte Electric & Power Co.*, 32 M 56, 69, 79 P 549.

Essentials of Abandonment

Abandonment of a water right is a voluntary act, and to constitute it there must be a concurrence of act and intent—the relinquishment of possession and the intent not to resume it for a beneficial use—neither alone being sufficient to bring about its abandonment. *Thomas et al. v. Ball et al.*, 66 M 161, 166, 213 P 597; *Osnes Livestock Co. v. Warren*, 103 M 284, 294, 62 P 2d 206.

Measurement of Water to Constitute Beneficial Use

In the absence of statute regulating the amount of water reasonably necessary for irrigation, the rule has generally been observed by the courts, to allow one inch per acre in fixing the amount required for economical use, unless the evidence discloses that a greater or less amount is required; and the system of irrigation in common use in the locality if reasonable and proper under existing conditions is to be taken as the standard; but an appropriator cannot be compelled to divert the water according to the most scientific method known. *Worden v. Alexander*, 108 M 208, 213, 90 P 2d 160.

No Land Qualifications Necessary for Appropriation

An appropriator of water need not be either an owner or in possession of land to make a valid appropriation for irrigation purposes. *Toohey v. Campbell*, 24 M 13, 17, 60 P 396; *Smith v. Denniff*, 24 M 20, 27, 60 P 398; *Bailey v. Tintinger*, 45 M 154, 175, 122 P 575.

The right to the use of water may be owned without regard to the title to lands on which the water is to be used. *Toohey v. Campbell*, 24 M 13, 17, 60 P 396.

Right of Landowner to Use Ditch of Easement Holder

The owner of land over which another has an easement for a ditch right of way, may use the ditch so long as such use is subordinate to the easement and does not restrict or limit its exercise. *Galahan v. Lewis*, 105 M 294, 301, 72 P 2d 1018.

Unused Excess Not Appropriated

The diversion of water for domestic purposes in excess of what is required, and allowing such excess to overflow lands without any intention of irrigating, and without any intention of using such excess for any useful purpose, does not constitute an appropriation of the excess. *Power v. Switzer*, 21 M 523, 529, 55 P 32.

The rights of appropriators of water may not be measured entirely by what they claimed in their notices of appropriation, but must be measured by their beneficial use thereof over reasonable periods; consideration must be given to the extent and manner of their use, the character of the land upon which used and the general necessities of the case, as well as whether stream furnished by usual rains or snows, extraordinary rain or snow fall, or by springs or seepage. *Irion v. Hyde*, 107 M 84, 95, 81 P 2d 353.

Water Necessary Per Acre

The question as to what amount of water is necessary per acre for irrigation is one of fact and never one of law, notwithstanding the adoption of the rule generally in this state to allow an inch to the acre, in the absence of evidence warranting a greater or less award. *Tucker v. Missoula Light & Ry. Co. et al.*, 77 M 91, 101, 250 P 11.

Water Right Is Measured by Capacity of System of Distribution Regardless of Needs

Neither the appropriator of water nor one to whom a right is decreed owns the corpus of any part of the flow of a stream; he is entitled only to the beneficial use of the amount of water called for by his appropriation or the decree when he has need therefor, provided his distributing system has a sufficient capacity to carry that amount; if incapable of carrying that amount, his right is measured by the capacity of his system of distribution regardless of his needs. *Tucker v. Missoula Light & Ry. Co. et al.*, 77 M 91, 101, 250 P 11.

What Does Not Work Abandonment—Trespassers

Where plaintiff's predecessors in interest

for thirteen years used a water right acquired by a desert land entryman after the entry had been cancelled and thus were trespassers upon the public domain, that fact did not deprive the plaintiff from resuming the use of the water upon acquiring possession, unaffected by any junior rights which came into being in the meantime, there being no law enforcing abandonment of a vested water right as a penalty for exercising it as a trespasser. *Osnes Livestock Co. v. Warren*, 103 M 284, 294, 62 P 2d 206.

What Is a Beneficial Use

As every appropriation must be made for a beneficial or useful purpose, it becomes the duty of the courts to try the question of the claimant's intent by his acts and the circumstances surrounding his possession of the water, its actual or contemplated use, and the purposes thereof. *Toohey v. Campbell*, 24 M 13, 18, 60 P 396; *Miles v. Butte Electric & Power Co.*, 32 M 56, 67, 79 P 549; *Smith v. Duff*, 39 M 382, 388, 102 P 984.

Where a successor in interest of an appropriator of water greatly increased the amount of grass for pasture by irrigation, such use of the water was a useful and beneficial one within the meaning of this section. *Sayre v. Johnson*, 33 M 15, 19, 81 P 389.

Respecting the use of water for purposes of irrigation, the ultimate question in every case is, how much will supply the actual needs of the prior claimant under

existing conditions. *Conrow v. Huffine*, 48 M 437, 445, 138 P 1094.

When Intent to Use Beneficially Must Exist

This section requires that, at the time of taking the initial steps, the claimant must have an intention to apply the water to a useful or beneficial purpose. *Power v. Switzer*, 21 M 523, 529, 55 P 32; *Toohey v. Campbell*, 24 M 13, 18, 60 P 396; *Miles v. Butte Electric & Power Co.*, 32 M 56, 67, 79 P 549; *Smith v. Duff*, 39 M 382, 388, 102 P 984; *Bailey v. Tintinger*, 45 M 154, 178, 122 P 575.

While the appropriation must be for some useful or beneficial purposes, the use to which the water is to be applied need not be immediate, but may be prospective or contemplated. *Toohey v. Campbell*, 24 M 13, 17, 60 P 396; *Miles v. Butte Electric & Power Co.*, 32 M 56, 67, 79 P 549; *Smith v. Duff*, 39 M 382, 389, 102 P 984; *Bailey v. Tintinger*, 45 M 154, 175, 122 P 575.

References

Cited or applied as section 1251, 5th Division Compiled Statutes of 1887, in *Tucker v. Jones*, 8 M 225, 229, 19 P 571; *Quigley v. McIntosh*, 110 M 495, 505, 103 P 2d 1067.

Waters and Water Courses—10, 32, 33, 132, 151, 152.

67 C.J. *Waters* §§ 416, 446, 499 et seq., 504 et seq.

56 Am. Jur. 753, *Waters*, §§ 306 et seq.

89-803. (7095) Point of diversion may be changed—change of use. The person entitled to the use of water may change the place of diversion, if others are not thereby injured, and may extend the ditch, flume, pipe, or aqueduct, by which the diversion is made, to any place other than where the first use was made, and may use the water for other purposes than that for which it was originally appropriated.

History: En. Sec. 3, p. 131, L. 1885; re-en. Sec. 1252, 5th Div. Comp. Stat. 1887; re-en. Sec. 1882, Civ. C. 1895; re-en. Sec. 4842, Rev. C. 1907; re-en. Sec. 7095, R. C. M. 1921. Cal. Civ. C. Sec. 1412.

Burden of Proof of Injury by Change of Place of Diversion

An owner of a water right, who alleges in his suit to enjoin another having a right on the same stream from changing the place of his diversion on the ground that the change will result in injury to him, has the burden of proving such injury. *Thrasher et al. v. Mannix & Wilson*, 95 M 273, 276, 26 P 2d 370.

Change in Place of Diversion and Use

Under this section, the location of a flume maintained over the land of another,

as well as the use of the water flowing through it, may be changed, provided the change adds no new burdens to the servient estate or causes additional damage thereto. *Pioneer Min. Co. v. Bannack Gold Min. Co.*, 60 M 254, 265, 198 P 748.

Actual diversion of water and its beneficial use existing, prospective or in contemplation constitute an appropriation, which is not affected by a change in the point of diversion or place of use. *Wheat et al. v. Cameron et al.*, 64 M 494, 501, 210 P 761.

Neither a change in the place of diversion of water nor a change in its use from mining to agriculture, or vice versa, affects its appropriation. *Thomas et al. v. Ball et al.*, 66 M 161, 166, 213 P 597.

See also: *Galiger et al. v. McNulty et al.*, 80 M 339, 362, 260 P 401; *Whitecomb*

v. Murphy, 94 M 562, 23 P 2d 980; Thrasher et al. v. Mannix & Wilson, 95 M 273, 26 P 2d 370; Loynning v. Rankin, — M —, 165 P 2d 1006, 1011.

The conclusiveness of a judgment as res judicata in a water right suit between the same parties or their successors in interest in a prior action, is not impaired by the alleged fact that in authorizing a change of place of use or point of diversion, it violated the provisions of this section. Brennan et al. v. Jones et al., 101 M 550, 556, 55 P 2d 697.

Extended Use and Changes to Detriment of Others

Held, that where changes have occurred since the decree, brought about by appellant's change of diversion to new places or areas, increased, additional or different uses of water, he may not contend that owners of decreed rights may use the water decreed to them no matter how much they increase the use thereof on additional lands so long as they do not exceed their decreed quota per unit of time, to the injury of subsequent appropriators, as the limitation is based on water taken and beneficially applied on lands either in actual or contemplated irrigation at the time it was decreed. Quigley v. McIntosh, 110 M 495, 505, 103 P 2d 1067.

Extent of Use in Terms of Flow per Unit of Time

The fact that for many years the courts in water right decrees have followed the custom of expressing water rights in terms of flow per unit of time without stating during how many hours or days the water could be taken or defining the volume of water which could be used, may not be taken as an adjudication that appropriations were of an absolutely uninterrupted flow, thereby removing the established limitation of the appropriator's right to water actually taken and beneficially applied, or to expand appropriations to the detriment of subsequent appropriators. Quigley v. McIntosh, 110 M 495, 508, 103 P 2d 1067.

May Appropriate for Sale or Rental—Change of Use

An appropriation of water may be made for the purpose of sale or rental; but the appropriator may change the use, under this section, if subsequent appropriators are not thereby injured. Sherlock v. Greaves, 106 M 206, 218, 76 P 2d 87.

89-804. (7096) Water may be turned into natural channels and reclaimed. The water appropriated may be turned into the channel of another stream, or from a reservoir into a stream and mingled with its waters, and then reclaimed; but in reclaiming it, water already appropriated by another shall not be diminished in quantity, nor deteriorated in quality.

Use May Be Clothed with Public Interest

Property (including water) may be clothed with a public interest when used in a manner to make it a public consequence and affect the community at large; it is the extent and character of the use which makes it public; property may be shown to have been devoted to a public use without regard to statutory provisions. Sherlock v. Greaves, 106 M 206, 221, 76 P 2d 87.

Use of Any of Several Ditches

Where an owner of a water right had several ditches for the irrigation of his lands, he had a right to use any of them at which he had a headgate so long as other users were not injured thereby. Tucker v. Missoula Light & Ry. Co. et al., 77 M 91, 99, 250 P 11.

When Lower Appropriators May Complain

The successors of the appropriator of water appropriated for placer mining purposes cannot so change its use as to deprive lower appropriators of their rights, already acquired, in the use of it for irrigating purposes. Head v. Hale, 38 M 302, 308, 100 P 222.

The restriction placed upon the right of an appropriator of water to change the place of diversion as well as the use, is a matter of defense, and the burden is upon the party who claims to have been adversely affected by such change to allege and prove the facts. Hansen v. Larsen, 44 M 350, 353, 120 P 229.

The burden is on the party claiming to be prejudiced by a change of the point of diversion to allege and prove the facts. Lokowich v. City of Helena, 46 M 575, 577, 129 P 1063.

References

Cited or applied as section 1882, Civil Code, in City of Helena v. Rogan, 26 M 452, 475, 68 P 798; as section 4842, Revised Codes, in Featherman v. Hennessy, 43 M 310, 316, 115 P 983; Maclay v. Missoula Irr. Dist. et al., 90 M 344, 3 P 2d 286.

Waters and Water Courses—30, 145.

67 C.J. Waters § 462 et seq.

56 Am. Jur. 754, Waters, §§ 309 et seq.

History: En. Sec. 4, p. 131, L. 1885; re-en. Sec. 1253, 5th Div. Comp. Stat. 1887; re-en. Sec. 1883, Civ. C. 1895; re-en. Sec. 4843, Rev. C. 1907; amd. Sec. 2, Ch. 228, L. 1921. Cal. Civ. C. Sec. 1413.

Operation and Effect

While this section authorizes an appropriator to turn water into the channel of a stream other than the one from which he appropriates, he may do so only if the waters in the stream the channel of which he thus uses are not deteriorated in quality to the detriment of a prior appropriator thereof. *Missoula P. S. Co. v. Bitter Root Irr. Dist.*, 80 M 64, 69, 257 P 1038.

While under this section one may employ the natural channel of a stream for the conveyance of water which he has developed and reclaim it if the rights of prior appropriators are not thereby diminished in quantity nor deteriorated in quality, the rule has no application where an increase in the flow of the stream results solely by percolation from irrigation on adjacent lands. *Rock Creek Ditch etc. Co. v. Miller*, 93 M 248, 262, 17 P 2d 1074;

State ex rel. Mungas v. District Court, 102 M 533, 539, 59 P 2d 71.

Seepage Water, Potholed and Recaptured

Seepage water which has its rise along the bed of a stream and forms a natural accretion thereto belongs to the stream as a part of its source of supply, the same as do feeder springs, and an appropriator of water on such stream has the right to all such tributary flow even as against the owner of the land; held, that conducting water from upper reaches of tributary to "potholes" and "reservoirs" and then capturing the seepage therefrom in ditches, is insufficient proof of creating a new supply for an additional water right. *Woodward v. Perkins*, 116 M 46, 53, 147 P 2d 1016.

References

Jeffer v. Montana Power Co. et al., 68 M 114, 139, 142, 217 P 652; *Donich et al. v. Johnson et al.*, 77 M 229, 240, 250 P 963.

Waters and Water Courses 23, 24, 142, 143.

67 C.J. Waters § 433 et seq.

89-805. (7097) Return of surplus water to stream. In all cases where, by virtue of prior appropriation, any person may have diverted all the water of any stream, or to such an extent that there shall not be an amount sufficient left therein for those having a subsequent right to the waters of such stream, and there shall, at any time, be a surplus of water so diverted, over and above what is actually and necessarily used by the prior appropriator, such person shall be required to turn, and cause to flow back into the stream, such surplus water, and, upon failure so to do within twenty-four hours after demand being made upon him in writing, to him in person or at his place of abode, by any person having a right to the use of such surplus water, the person so diverting the same shall be liable to the person aggrieved for the damage resulting therefrom, in such sum as may be determined by court.

History: Ap. p. Sec. 1, p. 52, L. 1879; re-en. Sec. 731, p. 562, 5th Div. Rev. Stat. 1879; re-en. Sec. 1239, 5th Div. Comp. Stat. 1887; amd. Sec. 1884, Civ. C. 1895; re-en. Sec. 1, Ch. 56, L. 1907; Sec. 4844, Rev. C. 1907; re-en. Sec. 7097, R. C. M. 1921.

Operation and Effect

Where a party has all the water his necessities require or that his ditches will carry it is immaterial that he has a right, under decree or otherwise, to a greater flow from the stream; he must permit the excess to remain therein or, having diverted it, return it thereto in such a manner that it will be available to subsequent appropriators. *Tucker v. Missoula Light & Ry. Co. et al.*, 77 M 91, 98, 101, 102, 250 P 11.

Under this section, a prior appropriator

of water must turn back into the stream from which the water is taken all over and above what is actually and necessarily used by him. *Galiger et al. v. McNulty et al.*, 80 M 339, 356, 260 P 401.

Subsequent appropriators of water may compel a prior appropriator to release water for their use which he does not need for a beneficial use. *Gans & Klein Invest. Co. v. Sanford et al.*, 91 M 512, 522, 2 P 2d 808.

References

Cited or applied as section 4844, Revised Codes, in *Featherman v. Hennessy*, 43 M 310, 316, 115 P 983; *Conrow v. Huffine*, 48 M 437, 445, 138 P 1094; *Pioneer Min. Co. v. Bannack Gold Min. Co.*, 60 M 254, 265, 198 P 748; *Mettler v. Ames Realty Co.*, 61 M 152, 201 P 702; *Allen v. Petrick et al.*,

69 M 373, 379, 222 P 451; Zosel v. Kohrs et al., 72 M 564, 577, 234 P 1089; Quigley v. McIntosh, 88 M 103, 108, 290 P 266; Maclay v. Missoula Irr. Dist. et al., 90 M 344, 3 P 2d 286; Sherlock v. Greaves, 106 M 206, 221, 76 P 2d 87.

89-806. Diversion of natural flow of waters, when permitted. Any person, persons, association or corporation, owning or in possession of lands susceptible of irrigation from any stream, the waters of which are so diminished by prior appropriations that a sufficient amount of water for the irrigation of their lands cannot be obtained from the natural flow of the stream, who shall construct a reservoir, or shall purchase or lease water from a reservoir owned by the state water conservation board of the state of Montana, or another, or shall otherwise acquire an interest in such reservoir, or in water stored therein, which is so located that because of natural or other obstacles the water impounded therein cannot be conducted to the lands which they desire to irrigate, may, provided the stored water can be discharged into the stream in such a manner that it can be used beneficially by prior appropriators, divert the natural flow of the stream for the irrigation of their lands in lieu of an equal amount of stored water, provided, however, that such exchange can be made without injury to said prior appropriators.

History: En. Sec. 1, Ch. 39, 1937.

Waters and Water Courses 78 et seq.
67 C.J. Waters § 162 et seq.

89-807. (7098) First in time, first in right. As between appropriators the one first in time is first in right.

History: En. Sec. 5, p. 131, L. 1885; re-en. Sec. 1254, 5th Div. Comp. Stat. 1887; re-en. Sec. 1885, Civ. C. 1895; re-en. Sec. 4845, Rev. C. 1907; re-en. Sec. 7098, R. C. M. 1921. Cal. Civ. C. Sec. 1414.

Operation and Effect

Priority of appropriation of water confers superiority of right, without reference to the character of the use, whether natural or artificial. Mettler v. Ames Realty Co., 61 M 152, 201 P 702.

References

Cited or applied as section 4845, Revised Codes, in Featherman v. Hennessy, 43 M 310, 316, 115 P 983; Conrow v. Huffine, 48 M 437, 445, 138 P 1094; Galiger et al. v. McNulty et al., 80 M 339, 362, 260 P 401; Quigley et al. v. McIntosh et al., 110 M 495, 505, 103 P 2d 1067.

Waters and Water Courses 12, 135.
67 C.J. Waters § 439 et seq.

89-808. (7099) Appropriation by United States. The government of the United States may, by and through the secretary of the interior, or any person by him duly authorized to act in that behalf, appropriate the water of streams or lakes within the state of Montana in the same manner and subject to the general conditions applicable to the appropriation of the waters of the state by private individuals; provided, such appropriation shall be held valid for the period of three years after the filing of the notice of appropriation thereof in the office of the county clerk and recorder of the appropriate county, but such appropriation shall be null and void after the period of three years unless, prior to the expiration of such period, the work of constructing the canal or ditch by which the same is to be diverted shall have been commenced; provided further, that if at any time prior to the expiration of the aforesaid period of three years the secretary of the interior, or a person by him duly authorized to act in the premises, files a notice with the county clerk and recorder in the county in which the original appropriation notice was filed, announcing

an abandonment by the government of the United States of the irrigation project for which the water was appropriated, then and in that event the appropriation shall become null and void.

History: En. Sec. 1, Ch. 44, L. 1905; re-en. Sec. 4846, Rev. C. 1907; re-en. Sec. 7099, R. C. M. 1921.

Operation and Effect

The United States must proceed, in making appropriations of water from non-navigable streams of this state, as a corporation or individual. *Bailey v. Tintin-*

ger, 45 M 154, 177, 122 P 575. See *United States v. Burley* (C. C.), 172 Fed. 615; *Burley v. United States*, 179 Fed. 1, C. C. A. 429. See also *Mettler v. Ames Realty Co.*, 61 M 152, 201 P 702.

Waters and Water Courses 8, 11-17, 131, 133.

67 C.J. *Waters* §§ 415, 422 et seq.

89-809. Procedure for reciprocal appropriation of waters by Montana and Wyoming. Appropriations of water for beneficial use in the state of Montana may be made, by the state of Wyoming to which it is desired to divert such water, when and only after such state shall have enacted legislation generally similar in purport to the provisions of this act, whereby water may be appropriated within the state of Wyoming for use within the state of Montana. Such appropriations shall be valid only when the state water conservation board shall have issued a certificate of appropriation that the waters appropriated have been or will be used for a beneficial purpose as set forth in the certificate; such certificate shall be filed with and be made a part of such appropriation of water. The state water conservation board is empowered and authorized by and through the state engineer or other authorized agent to cooperate with the state engineer of the state of Wyoming, in the determination, supervision and control of all water and water appropriations on all interstate streams; and to these ends the state water conservation board, by and with the consent of the governor may enter into the necessary agreements with the state engineer or other agency in control of such subject, to carry out the purposes of this act; provided, that such agreements are not in conflict with the provisions of the reclamation or irrigation law now in force in this state; provided further that such authority shall not be exercised by the state water conservation board or the state engineer until after the state of Wyoming has passed a law granting like authority to that herein granted.

History: En. Sec. 1, Ch. 64, L. 1937.

59 C.J. *States* §§ 13, 14; 67 C.J. *Waters* § 416.

States 6; *Waters and Water Courses* 10, 132.

89-810. (7100) Notice of appropriation. Any person hereafter desiring to appropriate the waters of a river, or stream, ravine, coulee, spring, lake, or other natural source of supply concerning which there has not been an adjudication of the right to use the waters, or some part thereof, must post a notice in writing in a conspicuous place at the point of intended diversion, stating therein:

1. The quantity of water claimed, measured as hereinafter provided;
2. The purpose for which it is claimed and place of intended use;
3. The means of diversion, with size of flume, ditch, pipe, or aqueduct, by which he intends to divert it;
4. The date of appropriation;
5. The name of the appropriator.

Within twenty days after the date of appropriation the appropriator shall file with the county clerk of the county in which such appropriation is made a notice of appropriation, which, in addition to the facts required to be stated in the posted notice, as hereinbefore prescribed, shall contain the name of the stream from which the diversion is made, if such stream have a name, and if it have not, such a description of the stream as will identify it, and an accurate description of the point of diversion of such stream, with reference to some natural object or permanent monument. The notice shall be verified by the affidavit of the appropriator or some one in his behalf, which affidavit must state that the matters and facts contained in the notice are true.

History: En. Sec. 6, p. 131, L. 1885; re-en. Sec. 1255, 5th Div. Comp. Stat. 1887; re-en. Sec. 1886, Civ. C. 1895; re-en. Sec. 4847, Rev. C. 1907; amd. Sec. 3, Ch. 228, L. 1921; re-en. Sec. 7100, R. C. M. 1921. Cal. Civ. C. Sec. 1415.

Cross-Reference

Fee for recording, sec. 25-231.

Date of Appropriation When Notice Is Defective

Where appropriators of water were denied the right to relate back the life of their appropriation to the date of posting their notice of appropriation because their recorded notice was rendered ineffective by a fatally defective verification, but the evidence showed that they put water on their land for a beneficial purpose on or about a certain time, their right bore date as of such time. *Musselshell Valley F. & L. Co. v. Cooley*, 86 M 276, 287, 283 P 213.

Essentials to Complete Appropriation by Statutory Method

To secure a completed appropriation of water under the statute, notice must be posted and filed as herein required; and, under the following section, work must be commenced within forty days after the notice is posted and it must be prosecuted with reasonable diligence and be actually completed. *Bailey v. Tintinger*, 45 M 154, 173, 122 P 575.

Essentials to Complete Appropriation Under Old Rule Prior to Act of 1885

The essential features of an appropriation of water made prior to Laws of 1885, p. 130, were a completed ditch and the application of water to a beneficial use. *Maynard v. Watkins et al.*, 55 M 54, 173 P 551.

Two Methods of Appropriating Water

Since 1885, two distinct methods of appropriating water are prescribed; one, by complying with the rules and customs of the early settlers; the other, by complying with the terms of the statute. *Bailey v. Tintinger*, 45 M 154, 162, 122 P 575.

Verification of Notice

A notice of location of a water right is fatally defective unless it is verified in conformity with this section. *Murray v. Tingley*, 20 M 260, 265, 50 P 723.

A water right—an easement in gross—when acquired by appropriation amounts to a grant by the United States or the state and the appropriator is in position of a grantee. The affidavit required by statute to be attached to a notice of appropriation serves the same purpose as, and is of equal dignity with, an acknowledgment. Held, that where an appropriation was made by a firm composed of two brothers, and the affidavit accompanying the notice of appropriation was verified by one of them, a grantee, as notary public, the verification was void and the notice was not entitled to record. *Musselshell Valley F. & L. Co. v. Cooley*, 86 M 276, 287, 283 P 213.

When Prima Facie Evidence of Its Contents

The record of notice of appropriation of water conforming to the provisions of this section, and filed as provided therein, is prima facie evidence of its contents. *Anderson v. Spear-Morgan Livestock Co.*, 107 M 18, 27, 79 P 2d 667; *Vidal v. Kensler*, 100 M 592, 594, 51 P 2d 235.

Fixing Date in Decree

There is no valid objection to the fixing of an arbitrary date of appropriation in a decree, unless another appropriator can show that his right antedates the date fixed, instead of being subsequent thereto as shown by the decree. *Vidal v. Kensler*, 100 M 592, 594, 51 P 2d 235.

References

Anaconda Nat. Bank v. Johnson et al., 75 M 401, 244 P 141.

Waters and Water Courses—16, 133.
67 C.J. Waters § 422 et seq.
56 Am. Jur. 746, Waters, § 297.

89-811. (7101) Diligence in appropriating. Within forty days after posting such notice, the appropriator must proceed to prosecute the excavation or construction of the work by which the water appropriated is to be diverted, and must prosecute the same with reasonable diligence to completion. If the ditch or flume, when constructed, is inadequate to convey the amount of water claimed in the notice aforesaid, the excess claimed above the capacity of the ditch or flume shall be subject to appropriation by any other person, in accordance with the provisions of this chapter.

History: En. Sec. 7, p. 132, L. 1885; re-en. Sec. 1256, 5th Div. Comp. Stat. 1887; re-en. Sec. 1887, Civ. C. 1895; re-en. Sec. 4848, Rev. C. 1907; re-en. Sec. 7101, R. C. M. 1921. Cal. Civ. C. Sec. 1416.

Completion of Ditch—Reasonable Diligence

Where an appropriator of water filed a proper notice of appropriation on November 20, 1894, and shortly thereafter commenced construction of a ditch but had to suspend operations because of freezing weather, and because of the length and size of the ditch did not continuously work during the year 1895 but began irrigation in the spring of 1896, a finding that he did not proceed with reasonable diligence was unwarranted. *Anderson v. Spear-Morgan Livestock Co.*, 107 M 18, 27, 79 P 2d 667.

When Appropriation Complete

The steps necessary to be taken to

make a completed appropriation of water are: posting notice, filing same with county clerk, commencing construction of a ditch within forty days after posting notice, prosecuting such work with reasonable diligence, and actual completion of the work of construction. *Anderson v. Spear-Morgan Livestock Co.*, 107 M 18, 27, 79 P 2d 667.

References

Cited or applied as section 1887, Civil Code, in *Murray v. Tingley*, 20 M 260, 266, 50 P 723; as section 4848, Revised Codes, in *Bailey v. Tintinger*, 45 M 154, 173, 122 P 575; *Anaconda Nat. Bank v. Johnson et al.*, 75 M 401, 244 P 141.

Waters and Water Courses—17, 135.
67 C.J. Waters § 427.

56 Am. Jur. 755, Waters, §§ 310, 311.

89-812. (7102) Effect of failure. A failure to comply with the provisions of this chapter deprives the appropriator of the right to the use of water as against a subsequent claimant who complies therewith, but by complying with the provisions of this chapter the right to the use of the water shall relate back to the date of posting the notice.

History: En. Sec. 8, p. 132, L. 1885; re-en. Sec. 1257, 5th Div. Comp. Stat. 1887; re-en. Sec. 1888, Civ. C. 1895; re-en. Sec. 4849, Rev. C. 1907; re-en. Sec. 7102, R. C. M. 1921. Cal. Civ. C. Sec. 1419.

"Appropriator"

The word "appropriator" is not susceptible of any greater or narrower force than the word "claimant," as used in the California Civil Code relating to water rights. Therefore no distinction can be drawn between the California water right act and that of Montana. *Murray v. Tingley*, 20 M 260, 266, 50 P 723.

Date of Appropriation Where Statute Is Not Complied With

Of two claimants of water, neither of whom had complied with the statute, he who first completes his ditch and puts it to a beneficial use has the prior right, although he began to build his ditch after the ditch of the other claimant had been

commenced. *Murray v. Tingley*, 20 M 260, 269, 50 P 723.

A prior appropriator may acquire a valid water right by a completed ditch, actual diversion of the water, and its application to a beneficial use without complying with the statute and good against everyone, except an appropriator who complies with the statute before the first claimant has applied the water to a beneficial use. *Murray v. Tingley*, 20 M 260, 268, 50 P 723; *Bailey v. Tintinger*, 45 M 154, 169, 122 P 575; *Vidal v. Kensler*, 100 M 592, 595, 51 P 2d 235.

Where appropriators of water were denied the right to relate back the life of their appropriation to the date of posting their notice of appropriation because their recorded notice was rendered ineffective by a fatally defective verification, but the evidence showed that they put water on their land for a beneficial purpose on or about a certain time, their right bore date as of such time. *Musselshell Valley F. & L. Co. v. Cooley*, 86 M 276, 288, 283 P 213.

Doctrine of "Relation Back"

Under the doctrine of "relation back," as between two persons digging ditches at the same time, and prosecuting work thereon, with reasonable diligence to completion, the one who first began work had the prior right, even though the other had completed his first. *Murray v. Tingley*, 20 M 260, 268, 50 P 723; *Wright v. Cruse*, 37 M 177, 182, 95 P 370.

One who complies with the statutes regulating the appropriation of water acquires a right which relates back to the date of the posting of his notice of location. *Murray v. Tingley*, 20 M 260, 269, 50 P 723; *Bailey v. Tintinger*, 45 M 154, 169, 122 P 575.

Before the doctrine of relation applies, a completed appropriation must have been effected. *Bailey v. Tintinger*, 45 M 154, 171, 179, 122 P 575.

No Evidentiary Value in Proving Amount or Date

Notices of appropriation of water not

recorded within the time provided in the saving clause found in the original recording act (Laws of 1885, p. 131) while prima facie evidence of the extent of the rights where the statute was complied with, are of no evidentiary value in proving the amount and date of an appropriation in case of noncompliance. *Galahan v. Lewis*, 105 M 294, 299, 72 P 2d 1018.

Purpose of Act

The purpose and object of the legislature was merely to define the conditions upon which the appropriator of water could have the advantage of the doctrine of relation. *Murray v. Tingley*, 20 M 260, 267, 50 P 723; *Bailey v. Tintinger*, 45 M 154, 168, 122 P 575.

Waters and Water Courses—12, 18, 133, 139.

67 C.J. Waters §§ 422 et seq., 440.

89-813. (7103) Record of declaration. Persons who have heretofore acquired rights to the use of water shall, within six months after the publication of this chapter, file in the office of the county clerk of the county in which the water right is situated, a declaration in writing, except notice be already given of record as required by this chapter, or a declaration in writing be already filed as required by this section, containing the same facts as required in the notice provided for record in section 89-810 of this chapter, and verified as required in said last-mentioned section, in cases of notice of appropriation of water; provided, that a failure to comply with the requirements of this section shall in nowise work a forfeiture of such heretofore acquired rights, or prevent any such claimant from establishing such rights in the courts.

History: En. Sec. 9, p. 132, L. 1885; re-en. Sec. 1258, 5th Div. Comp. Stat. 1887; re-en. Sec. 1889, Civ. C. 1895; re-en. Sec. 4850, Rev. C. 1907; re-en. Sec. 7103, R. C. M. 1921.

Operation and Effect

Where an appropriation of the waters of a stream for irrigating purposes was actually made by the plaintiff in the year 1880,

and the water used continuously ever since, but no record of the appropriation was made until 1891, such water right is superior to one acquired and recorded by the defendant in 1889. *Salazar v. Smart*, 12 M 395, 401, 30 P 676.

References

Galahan v. Lewis, 105 M 294, 299, 72 P 2d 1018.

89-814. (7104) Record prima facie evidence. The record provided for in sections 89-810 and 89-813, when duly made, shall be taken and received in all courts of this state as prima facie evidence of the statements therein contained.

History: En. Sec. 10, p. 132, L. 1885; re-en. Sec. 1259, 5th Div. Comp. Stat. 1887; re-en. Sec. 1890, Civ. C. 1895; re-en. Sec. 4851, Rev. C. 1907; re-en. Sec. 7104, R. C. M. 1921.

When Prima Facie Evidence of Its Contents

The record of notice of appropriation of water conforming to the provisions of sec. 89-810, and filed as provided therein, is

prima facie evidence of its contents. *Anderson v. Spear-Morgan Livestock Co.*, 107 M. 18, 27, 79 P 2d 667; *Wills v. Morris et al.*, 100 M 514, 531, 50 P 2d 862.

When Record No Evidence of Right

Notice of water rights not filed within the time provided in the saving clause of the original recording act of 1885 is of no evidentiary value in proving the amount or date of an appropriation. *Gala-*

han v. Lewis, 105 M 294, 299, 72 P 2d 1018.

References

Musselshell Valley F. & L. Co. v. Cooley, 86 M 276, 288, 283 P 213; *Vidal v. Kensler*, 100 M 592, 594, 51 P 2d 235.

Evidence—343(1), 383(7).

32 C.J.S. Evidence §§ 763, 767, 773.

89-815. (7105) Rights settled in one action. In any action hereafter commenced for the protection of rights acquired to water under the laws of this state, the plaintiff may make any or all persons who have diverted water from the same stream or source, parties to such action, and the court may in one judgment settle the relative priorities and rights of all the parties to such action. When damages are claimed for the wrongful diversion of water in any such action, the same may be assessed and apportioned by the jury in their verdicts, and judgment thereon may be entered for or against one or more of several plaintiffs, or for or against one or more of several defendants, and may determine the ultimate rights of the parties between themselves. In any action concerning joint water rights, or joint rights in water ditches, unless partition of the same kind is asked by parties to the action, the court shall hear and determine such controversy as if the same were several as well as joint.

History: En. Secs. 11 and 12, pp. 132-133, L. 1885; re-en. Sec. 1260, 5th Div. Comp. Stat. 1887; re-en. Sec. 1891, Civ. C. 1895; re-en. Sec. 4852, Rev. C. 1907; re-en. Sec. 7105, R. C. M. 1921.

All Parties are Antagonists

In an action to settle the relative priorities and rights of the parties to the use of the waters of a stream, every party to the suit is an antagonist of every other party. *McNinch v. Crawford*, 30 M 297, 299, 76 P 698. See *Sloan v. Byers*, 37 M 503, 513, 97 P 855; *Bennett v. Quinlan*, 47 M 247, 253, 131 P 1067.

Appeal Lies from Part of Judgment

Where two or more parties are awarded a water right under the terms of the decree, each of them recovers a judgment against the other or others; such a judgment is divisible into parts and therefore an appeal lies from a part thereof. *Wills v. Morris et al.*, 100 M 504, 508, 50 P 2d 858.

Nature of Action

This section contemplates equitable actions only, in which relative priorities and conflicting rights of all parties may be settled, and where the damages claimed are a mere incident. *Miles v. Du Bey*, 15 M 340, 341, 39 P 313; *Howell v. Bent*, 48 M 268, 273, 137 P 49.

This section does not apply to an action at law for damages for the wrongful diver-

sion of water, where there is no allegation in the complaint that would authorize the court to grant equitable relief, and there is no evidence to show that the plaintiff is entitled to such relief. *Miles v. Du Bey*, 15 M 340, 341, 39 P 313. See *Howell v. Bent*, 48 M 268, 273, 137 P 49.

The provision of this section is permissive and not mandatory. *Sloan v. Byers*, 37 M 503, 510, 97 P 855.

Id. The district court may settle the relative priorities and rights of all the parties to a water right suit in one judgment, only when pleadings have been framed so as to justify such settlement.

Id. Query as to whether the legislature, in enacting this section, intended to compel parties, made defendants to a water right suit pursuant to its provisions, to litigate their respective titles as between themselves; and, if so, has that body the power to coerce them to do so? See *Bennett v. Quinlan*, 47 M 247, 253, 131 P 1067.

Where several parties have diverted water so as to injure the crops of another, they cannot be held jointly liable for the acts of each other, nor can they be sued in one action for the entire damage, with or without an apportionment of the damage. *Howell v. Bent*, 48 M 268, 272, 137 P 49.

Action under Montana statute to determine relative rights and priorities of parties claiming interests in waters of a stream, while in personam, is in effect one to quiet title to real property. *Sain et al. v. Montana Power Co.*, 84 F 2d 126, 127.

Who May Be Parties

Property owners having the right to divert the waters of a creek for irrigation purposes may join in a suit to restrain a third person from diminishing the volume of water to the use of which they are entitled. *Beach v. Spokane Ranch & Water Co.*, 25 M 379, 382, 65 P 111.

The first provision of this section being permissive only, there was no presumption that the respective interests of joint own-

ers in an undivided water right had been adjudicated among themselves in a suit in which their predecessors were codefendants, in the absence of a showing to that effect upon the face of the decree or the judgment roll. *Bennett v. Quinlan*, 47 M 247, 253, 131 P 1067.

Waters and Water Courses—33, 152.
67 C.J. Waters § 504 et seq.
56 Am. Jur. 763, Waters, §§ 321, 322.

89-816. (7106) Record of declarations and notices. The county clerk must keep a well-bound book, in which he must record the notices and declarations provided for in this title, and he shall be entitled to have and receive the same fees as are now or hereafter may be allowed by law for recording instruments entitled to be recorded.

History: En. Sec. 13, p. 133, L. 1885; re-en. Sec. 1261, 5th Div. Comp. Stat. 1887; re-en. Sec. 1892, Civ. C. 1895; re-en. Sec. 4853, Rev. C. 1907; re-en. Sec. 7106, R. C. M. 1921. Cal. Civ. C. Sec. 1421.

Records—5, 6.
53 C.J. Records §§ 8 et seq., 24 et seq.

89-817. (7107) Measurement of water—cubic foot. Hereafter a cubic foot of water (7.48 gallons) per second of time shall be the legal standard for the measurement of water in this state.

History: En. Sec. 1, p. 126, L. 1899; re-en. Sec. 4854, Rev. C. 1907; re-en. Sec. 7107, R. C. M. 1921.

Not Construed in Terms of Uninterrupted Flow to Detriment of Others

The fact that for many years the courts in water right decrees have followed the custom of expressing water rights in terms of flow per unit of time without stating during how many hours or days the water could be taken or defining the volume of water which could be used, may not be taken as an adjudication that appropriations were of an absolutely uninterrupted flow, thereby removing the established limitation of the appropriator's right to water actually taken and beneficially applied, or to expand appropriations to the detriment of subsequent appropriators. *Quigley v. McIntosh*, 110 M 495, 508, 103 P 2d 1067.

Measurement of Water in Reservoir

Devices for measuring the water in a storage reservoir should be such that at a glance any one may tell the exact number of acre feet therein at any time, thus obviating the necessity of calling in engineers or others to measure it; the details of operation, presenting, as they do, rather a practical or engineering problem than a judicial one, should properly be left to the parties interested, and if the court's intervention or assistance be required in that behalf, a motion for modification of the decree should answer the purpose. *Federal Land Bank v. Morris*, 112 M 445, 457, 116 P 2d 1007.

Weights and Measures—3.
68 C.J. Weights and Measures § 2.

89-818. (7108) Miner's inch equivalent in gallons. Where water rights expressed in miner's inches have been granted, one hundred miner's inches shall be considered equivalent to a flow of two and one-half cubic feet (18.7 gallons) per second; two hundred miner's inches shall be considered equivalent to a flow of five cubic feet (37.4 gallons) per second, and this proportion shall be observed in determining the equivalent flow represented by any number of miner's inches.

History: En. Sec. 2, p. 126, L. 1899; re-en. Sec. 4855, Rev. C. 1907; re-en. Sec. 7108, R. C. M. 1921.

Production of Miner's Inch in Acre Feet
One miner's inch continuous flow pro-

duces 1½ acre feet on an acre during a period of 30 days, or one month, hence one miner's inch in continuous flow for a period of two months would produce 3 acre feet. Spreading 3 acre feet during a period of four months, it would equal one-half min-

er's inch per acre in continuous flow. There is no law in Montana that one inch per acre should be allowed, although generally observed as a rule by the courts, many later decisions holding to the correct rule that the requirements of the lands in question for adaptable crops should fix the requirement in a particular

locality. *Federal Land Bank v. Morris*, 112 M 445, 452, 116 P 2d 1007.

References

Allen v. Petrick et al., 69 M 373, 385, 222 P 451; *Quigley v. McIntosh*, 110 M 495, 508, 103 P 2d 1067.

89-819. (7109) Not to affect existing decrees. The provisions of this act shall not affect or change the measurement of water heretofore decreed by a court, but such decreed water shall be measured according to the law in force at the time such decree was made and entered.

History: En. Sec. 3, p. 126, L. 1899; re-en. Sec. 4856, Rev. C. 1907; re-en. Sec. 7109, R. C. M. 1921.

References

Quigley v. McIntosh, 110 M 495, 508, 103 P 2d 1067.

89-820. (7110) Right to construct dams and raise water—conducting water over lands and railroad rights-of-way. The right to conduct water from or over the land of another for any beneficial use includes the right to raise any water by means of dams, reservoirs, or embankments to a sufficient height to make the same available for the use intended, and the right to any and all land necessary therefor may be acquired upon payment of just compensation in the manner provided by law for the taking of private property for public use; provided further, that if it is necessary to conduct the water across the right-of-way of any railroad, it shall be the duty of the owners of the ditch or flume to give thirty days' notice in writing to the owner or owners of such railway of their intention to construct a ditch or flume across the right-of-way of such railroad, and the point at which the said ditch or flume will cross the railroad; also the time when the construction of said ditch or flume will be made. If the owner or owners of such railroad or their agent fail to appear and attend at the time and place fixed in said notice, it shall be lawful for the owner or owners of the said flume or ditch to construct the same across the right-of-way of such railroad, without further notice to said owner or owners of the railroad.

History: En. Sec. 1894, Civ. C. 1895; re-en. Sec. 4857, Rev. C. 1907; re-en. Sec. 7110, R. C. M. 1921.

Right of Easement Holder to Make Repairs

The owner of a secondary easement such as a right to pass over the land of the servient owner for the purpose of making repairs on a dam and ditches owes the duty to repair a route that has become impassable or merely inconvenient rather than to materially deviate therefrom without consent of the servient owner; he may dig up soil and use it for repairs, doing no more injury than is necessary. The case at bar was a proceeding to quiet title to a secondary easement on another's land for irrigation purposes and enable the dominant owner to maintain and repair his ditches, and as much land as may be necessary for the purposes was awarded. *Laden v. Atkeson*, 112 M 302, 305, 116 P 2d 881.

Wing Dam Does Not Constitute Waste

Under this section an appropriator of water has the right to raise the level of water in a stream by means of a dam to a sufficient height to make it enter a ditch; hence contention that where a wing dam is used, the water which does not enter the ditch is improperly wasted, may not be sustained. *State ex rel. Crowley v. District Court*, 108 M 89, 104, 88 P 2d 23.

References

Bray v. Cove Irr. Dist. et al., 86 M 562, 566, 284 P 539; *Geary et al. v. Harper et al.*, 92 M 242, 252, 12 P 2d 276.

Eminent Domain 28; *Waters and Water Courses* 167, 168.

29 C.J.S. *Eminent Domain* §§ 45, 46; 67 C.J. *Waters* § 336 et seq.

89-821. (7111) Highways to be protected. Any person who digs and constructs ditches, dikes, flumes, or canals over or across any public roads or highways, or who uses the waters of such ditches, dikes, flumes, or canals, is required to keep the same in good repair at such crossings or other places where the water from any such ditches, dikes, flumes, or canals may flow over, or in anywise injure any roads or highways, either by bridging or otherwise.

History: En. Sec. 10, p. 58, L. 1870; re-en. Sec. 9, p. 499, Cod. Stat. 1871; re-en. Sec. 739, 5th Div. Rev. Stat. 1879; re-en. Sec. 1247, 5th Div. Comp. Stat. 1887; re-en. Sec. 1895, Civ. C. 1895; re-en. Sec. 4858, Rev. C. 1907; re-en. Sec. 7111, R. C. M. 1921.

For similar section, see Cal. Civ. C. Sec. 551.

Highways⇒120.

40 C.J.S. Highways § 185 et seq.

89-822. (7112) Penalty for violating preceding section. Any person offending against the preceding section, on conviction thereof, shall pay for every offense a fine of not less than twenty-five dollars, nor more than one hundred dollars, with costs of prosecution. One-half of the fine shall be paid into the county treasury for the benefit of the common schools of the county in which the offense was committed, and the other half shall be paid to the person informing the nearest magistrate that such offense has been committed, who shall issue a warrant upon proper complaint being made.

History: Ap. p. Sec. 11, p. 58, L. 1870; re-en. Sec. 10, p. 499, Cod. Stat. 1871; re-en. Sec. 740, 5th Div. Rev. Stat. 1879; re-en. Sec. 1248, 5th Div. Comp. Stat. 1887;

re-en. Sec. 1896, Civ. C. 1895; re-en. Sec. 4859, Rev. C. 1907; re-en. Sec. 7112, R. C. M. 1921.

89-823. (7113) Owners of water to sell surplus. Any person having the right to use, sell, or dispose of water, and engage in using, selling, or disposing of the same, who has a surplus of water not used or sold, or any person having a surplus of water, and the right to sell and dispose of the same, is required, upon the payment or tender to the person entitled thereto of an amount equal to the usual and customary rates per inch, to convey and deliver to the person such surplus of unsold water, or so much thereof for which said payment or tender shall have been made, and shall continue so to convey and deliver the same weekly so long as said surplus of unused or unsold water exists and said payment or tender be made as aforesaid.

History: En. Sec. 1, p. 406, L. 1877; re-en. Sec. 742, 5th Div. Rev. Stat. 1879; re-en. Sec. 1263, 5th Div. Comp. Stat. 1887; re-en. Sec. 1897, Civ. C. 1895; re-en. Sec. 4860, Rev. C. 1907; re-en. Sec. 7113, R. C. M. 1921.

interest, inhabitants were not entitled to injunctive relief in the absence of proof of tender of the customary rates. *Sherlock v. Greaves*, 106 M 206, 222, 76 P 2d 87.

Injunction Against Further Use

Where the owners of a water right had for many years permitted the inhabitants of a town to tap their near-by ditch for domestic uses for a consideration consisting in some instances of services about the ditch and in others of rental money, thus presumably acting under secs. 89-823 to 89-826, and then sought to enjoin such further use, held that while the course pursued had clothed such use with a public

Tender Essential to Demand Delivery and Institute Suit

While secs. 89-823 to 89-826 give the right to one who desires water from an appropriator who has a surplus and is entitled to sell it, to demand delivery thereof and institute suit to compel delivery if refused, he may do so only upon payment or a tender of the usual or customary rates per inch. *Sherlock v. Greaves*, 106 M 206, 222, 76 P 2d 87.

When Appropriator May Not Sell Water

After an appropriator of water has used it sufficiently to answer the purposes of his appropriation, he may not take the water of the stream remaining which he cannot use for such purposes and sell it so that it will deprive subsequent appropriators of their right to use it. *Sherlock v. Greaves*, 106 M 206, 217, 76 P 2d 87.

Where Claim of Adverse Possession or User No Defense

Where defendant townspeople for many years took water for domestic uses with the acquiescence of the ditch owners, either performed labor in repairing the ditch or paid an annual charge for the privilege of obtaining the water, thus recognizing the paramount right of plaintiffs, they were in no position, in an action to enjoin their further use to rely upon the defense of adverse possession or user. *Sherlock v. Greaves*, 106 M 206, 216, 76 P 2d 87.

Where Claim of Common-law Dedication No Defense

Where defendant townspeople for many years took water for domestic uses with

the acquiescence of the ditch owners, either performed labor in repairing the ditch or paid an annual charge for the privilege of obtaining the water, thus recognizing the paramount right of plaintiffs, they could not rely upon the defense of a common-law dedication in the absence of a showing of an offer to dedicate, in an action to enjoin their further use. *Sherlock v. Greaves*, 106 M 206, 217, 76 P 2d 87.

References

Cited or applied as section 1897, Civil Code, in *Helena & Livingston S. & R. Co. v. Lynch*, 25 M 497, 503, 65 P 919; as section 4860, Revised Codes in *Bailey v. Tintinger*, 45 M 154, 175, 122 P 575; *Mettler v. Ames Realty Co.*, 61 M 152, 201 P 702; *Jeffers v. Montana Power Co. et al.*, 68 M 114, 217 P 652; *Allen v. Petrick et al.*, 69 M 373, 379, 222 P 451; *Rock Creek Ditch etc. Co. v. Miller*, 93 M 248, 263, 17 P 2d 1074.

Waters and Water Courses 130, 141-145, 153.

67 C.J. *Waters* §§ 412 et seq., 433 et seq., 551 et seq.

89-824. (7114) Duty of purchaser to dig ditches. Any person desiring to avail himself of the provisions of the preceding section must, at his own cost and expense, construct or dig the necessary flumes or ditches to receive and convey the surplus water so desired by him, and pay or tender to the person having the right to the use, sale, or disposal thereof, an amount equal to the necessary cost and expense of tapping any gulch, stream, reservoir, ditch, flume, or aqueduct, and putting in gates, gauges, or other proper and necessary appliances usual and customary in such cases, and until the same shall be done, the delivery of the said surplus water shall not be required as provided in the preceding section.

History: En. Sec. 2, p. 406, L. 1877; re-en. Sec. 743, 5th Div. Rev. Stat. 1879; re-en. Sec. 1264, 5th Div. Comp. Stat. 1887; re-en. Sec. 1898, Civ. C. 1895; re-en. Sec. 4861, Rev. C. 1907; re-en. Sec. 7114, R. C. M. 1921.

References

Sherlock v. Greaves, 106 M 206, 219, 76 P 2d 87.

89-825. (7115) Enforcement of right to surplus. Any person constructing the necessary ditches, aqueducts, or flumes, and making the payments or tenders hereinbefore provided, is entitled to the use of so much of the said surplus water as said ditches, flumes, or aqueducts have the capacity to carry, and for which payment or tender is made, and may institute and maintain any appropriate action at law or in equity for the enforcement of such right or recovery of damages arising from a failure to deliver or wrongful diversion of the same.

History: En. Sec. 3, p. 406, L. 1877; re-en. Sec. 744, 5th Div. Rev. Stat. 1879; re-en. Sec. 1265, 5th Div. Comp. Stat. 1887; re-en. Sec. 1899, Civ. C. 1895; re-en. Sec.

4862, Rev. C. 1907; re-en. Sec. 7115, R. C. M. 1921.

References

Cited or applied as section 1899, Civil

Code, in *Helena & Livingston S. & R. Co. v. Lynch*, 25 M 497, 503, 65 P 919; *Sherlock v. Greaves*, 106 M 206, 219, 76 P 2d 87.

Waters and Water Courses 152.
67 C.J. Waters § 504 et seq.

89-826. (7116) Purchaser cannot sell. Nothing in the three preceding sections shall be so construed as to give the person acquiring the right to the use of water, as therein provided, the right to sell or dispose of the same after being so used by him, or prevent the original owner or proprietor from retaking, selling, and disposing of the same in the usual and customary manner, after it is so used as aforesaid.

History: En. Sec. 4, p. 407, L. 1877; re-en. Sec. 745, 5th Div. Rev. Stat. 1879; re-en. Sec. 1266, 5th Div. Comp. Stat. 1887; re-en. Sec. 1900, Civ. C. 1895; re-en. Sec. 4863, Rev. C. 1907; re-en. Sec. 7116, R. C. M. 1921.

Operation and Effect

Held, that the provisions of this section relating to the retaking and selling of surplus water for commercial purposes, applies to the sale and disposition of water by volume, and has no application to water

which has been abandoned and which through seepage and percolation reaches the waters of a natural stream. *Rock Creek Ditch etc. Co. v. Miller*, 93 M 248, 262, 264, 17 P 2d 1074.

References

Sherlock v. Greaves, 106 M 206, 220, 76 P 2d 87.

Waters and Water Courses 130.

67 C.J. Waters § 412 et seq.

89-827. (7117) Use of insecure reservoir forbidden. No person shall hereafter fill, or procure to be filled, with water, any dam or reservoir which is not so thoroughly and substantially constructed as that it will safely and securely hold the water to be turned therein.

History: En. Sec. 1901, Civ. C. 1895; re-en. Sec. 4864, Rev. C. 1907; re-en. Sec. 7117, R. C. M. 1921.

Rights of Person Reservoiring Water

Briefly epitomized, the rights of a person to reservoir water are as follows: He may, in any one year store for use in that or succeeding years what he has a right to use, and also any additional amounts which others would not have the right to use and which otherwise would go to waste. The appropriation and use of water, as well as the sites for reservoirs for collecting it, constitute a public use under art. III,

sec. 15, const. it being to the interest of the public that water be conserved rather than permitted to be wasted, that arid lands may be made productive. *Federal Land Bank v. Morris*, 112 M 445, 453, 116 P 2d 1007.

References

Donich et al. v. Johnson et al., 77 M 229, 240, 250 P 963; *Geary et al. v. Harper et al.*, 92 M 242, 252, 12 P 2d 276.

Waters and Water Courses 167, 168.

67 C.J. Waters § 336 et seq.

89-828. (7118) Dams and reservoirs to be securely constructed. No person shall hereafter construct, or cause to be constructed, on a stream, any dam or reservoir to accumulate the waters thereof, except in a thorough, secure, and substantial manner.

History: En. Sec. 1902, Civ. C. 1895; re-en. Sec. 4865, Rev. C. 1907; re-en. Sec. 7118, R. C. M. 1921.

Water Conservation by Dams and Reservoirs

Since water conservation and the construction and maintenance of dams and reservoirs have ripened into an important plan recognized by both federal and state governments, of which matter courts may take judicial notice, the district court, in

actions involving interference of water rights by construction of dams, where plaintiff asks for removal thereof, may in its discretion deny destruction thereof in finding for plaintiff, and order installation of headgates by which the rights of all concerned may be fully protected. *Irion v. Hyde*, 107 M 84, 96, 81 P 2d 353.

References

Donich et al. v. Johnson et al., 77 M 229, 240, 250 P 963.

89-829. (7119) Procedure for appropriating waters of adjudicated streams. (1) Any person hereafter desiring to appropriate the waters of a river, or stream, ravine, coulee, spring, lake, or other natural source of supply concerning which there has been an adjudication of rights between appropriators or claimants, as contemplated in section 89-839, shall employ a competent engineer to make a survey of the ditch, or aqueduct, whereby the water is to be conveyed from the source of supply, or the dam or other work whereby the water is to be impounded, or both, and the appropriators shall file with the clerk of the court in the county in which the water is appropriated a petition giving the amount of water sought to be appropriated, a description by name or otherwise of the water course or body from which he intends to appropriate the water, and a general description of the ditch or aqueduct, stating its size, length, and capacity, prepared by the engineer, showing the proposed means of appropriation and use of the water, and also the place of use thereof. If the means of appropriation be a reservoir by which the water is to be impounded, the petition shall state the location and size thereof, together with the contemplated manner of its construction and the means of conveying the water to the place of contemplated use, and the contemplated use.

(2) There shall be filed with the petition a map showing the point of, and means of diversion, and the course of the ditch or aqueduct to its terminus, and if a reservoir, the contour line thereof, the height and width of the dam, the point and means of discharge therefrom, and the spillway. If the appropriator shall intend to mingle the waters appropriated from one stream with another, or shall intend to deposit the waters impounded in a reservoir into a stream, he shall so state.

(3) The appropriator shall declare in his petition that the water rights sought by him shall be subject to, and that in the use thereof he shall be bound by the terms of any decree theretofore rendered by a court of competent jurisdiction adjudicating the waters of such river, stream, ravine, coulee, spring, lake, or other natural source of supply, or any body of water to which the same may be tributary.

(4) The appropriator shall, as near as may be, give the names of all appropriators or claimants who have, or appear to have, rights in the source of supply, from which the appropriation is sought, and whose rights may be in anywise affected by the appropriation, and in the petition the petitioner shall be named as plaintiff, and all other parties as defendants.

History: En. Sec. 4, Ch. 228, L. 1921; re-en. Sec. 7119, R. C. M. 1921.

Diversion into Fish Pond Without Outlet Constituting Unauthorized New Appropriation

Where, after the appointment of a water commissioner, there never was more than enough water in an adjudicated stream to supply the needs of the parties under their adjudicated rights, a diversion of water therefrom by one of them into a fish pond which had no outlet, constituted an attempted new appropriation under this section et seq., which in the absence of a decree establishing it, was unauthorized

and therefore properly prohibited by an order of court in a proceeding under sec. 89-1015. *Quigley v. McIntosh*, 110 M 495, 502, 103 P 2d 1067.

Exclusive Method

Held, that the method prescribed by sections 89-829 to 89-838, for making an appropriation of the waters of an adjudicated stream, is exclusive as to appropriations made after the passage of that Act. *Anaconda Nat. Bank v. Johnson et al.*, 75 M 401, 403 et seq., 410, 244 P 141.

Extent of Rights

Where a water right is allowed under the

provisions of this section and the following, it is governed by all the provisions of the decree by which the waters in the stream were adjudicated, just as if the new appropriator had been a party to that decree—he has the right to use the waters in the order of his juniority and divert them as of the date of his appropriation when he does not interfere with the superior rights of others. *Quigley v. McIntosh*, 88 M 103, 104 et seq., 290 P 266.

Id. An appropriator of water from an adjudicated stream being simply a junior appropriator who may use the water subject to the superior rights of others, the decree should contain provisions respecting the use of the water as between senior and junior appropriators consistent with those contained in the original decree, and restrictions therein, such as that the new appropriator should cease to divert water when the volume of water flowing in the stream shall be equal to or less than

that of the prior decreed rights, are unwarranted.

Purpose

One seeking to appropriate water from an adjudicated stream under this section and the following, may do so upon compliance with the conditions prescribed without regard to whether the water sought to be appropriated is a part of the normal flow, or excess or surplus water, i.e., water flowing in the stream in addition to adjudicated waters; the purpose of the Act is to provide security for those whose rights have theretofore been adjudicated and to compel the new appropriator to take his water right subject to the prior rights fixed, after bona fide litigation, by the decree of a competent court. *Quigley v. McIntosh*, 88 M 103, 104 et seq., 290 P 266.

Waters and Water Courses—133, 152.
67 C.J. Waters §§ 422 et seq., 504 et seq.
56 Am. Jur. 758, Waters, §§ 315 et seq.

89-830. (7120) Summons—issuance and service. Upon the filing of the petition, the clerk shall issue a summons in the same form as the summons in a civil action, and a copy of the petition shall be served upon each defendant at the time of serving the summons. Service shall be made as in civil actions and service may be made by publication as provided in sections 93-3013 to 93-3015.

History: En. Sec. 5, Ch. 228, L. 1921;
re-en. Sec. 7120, R. C. M. 1921.

89-831. (7121) Appearance—default—decree. If any defendant shall not appear within twenty days after the service of summons upon him, it shall be deemed by the court that he has no objection to the court granting the appropriation sought by the plaintiff, and the defendant so failing to appear shall be deemed in default. Any defendant may appear by motion, demurrer, or answer, as in civil action. The procedure in civil actions shall be followed in all proceedings under the terms of this act; provided, that when the pleadings are settled the court shall summarily proceed to try and determine the case. Evidence may be offered by the parties as in civil actions. At the conclusion of the trial, the court may enter an interlocutory or permanent decree allowing the appropriation sought, either in whole or in part, subject to all prior rights as adjudicated, and subject to the terms of all prior decrees, or may make any other order deemed proper in the premises. If no objections are filed the court shall enter such decree as the facts warrant.

History: En. Sec. 6, Ch. 228, L. 1921;
re-en. Sec. 7121, R. C. M. 1921.

Waters and Water Courses—152.
67 C.J. Waters § 504 et seq.

89-832. (7122) Decree subject to prior adjudicated rights. If the defendants, or any of them, do not appear, their adjudicated rights which are prior in time to plaintiff's right shall in nowise be affected by the court's order. The court shall in every case, if an appropriation be awarded plaintiff, provide that the same shall be subject to all adjudicated rights which are

prior in time to plaintiff's rights, and the plaintiff shall be bound by the terms of all prior decrees with respect to water rights in the proper order of his priority as if he had been a party to the decree originally.

History: En. Sec. 7, Ch. 228, L. 1921;
re-en. Sec. 7122, R. C. M. 1921; amd. Sec.
1, Ch. 38, L. 1927.

89-833. (7123) Scope of decree—diversion of waters to another stream.
If the water awarded the appropriator by the decree is to be taken from one stream or source of supply and turned into another stream or water course, and there mingled with the waters flowing therein, the court shall make provision in the decree regulating the same, to the end that the water appropriated by others shall not be diminished or deteriorated in quantity by the additional burden placed upon the stream or water course. The court may provide that the appropriator shall provide all necessary measuring devices so that the water turned in by him from another stream, reservoir, or other source of supply and the water taken by him may be ascertained at any time and all times, and may provide that he shall leave in the stream or water course a percentage of the water turned in by him to bear a proportion of the loss caused by seepage and evaporation in passage. The court shall have a wide discretion in ascertaining and determining the facts in all cases under the provisions of this act in order that the rights of all parties may be protected.

History: En. Sec. 8, Ch. 228, L. 1921;
re-en. Sec. 7123, R. C. M. 1921.

89-834. (7124) Decree to govern conditions of performance of work.
The court may provide by interlocutory decree awarding the appropriation, the condition under which the ditch, aqueduct, dam, or other work, necessary to the complete appropriation, shall be done and the time within which the same shall be completed until the conditions imposed are complied with. Upon a full compliance with the terms prescribed by the court, it shall enter its order and decree establishing the appropriation and fixing the date thereof, which, if the appropriator shall have been diligent in complying with the court order, shall be the date of the filing of the petition. The court may fix a later date if the facts warrant.

History: En. Sec. 9, Ch. 228, L. 1921;
re-en. Sec. 7124, R. C. M. 1921.

89-835. (7124.1) Adjudicating rights of persons not party to decree.
At any time after the entry of any decree, any person, not a party to such decree, who, prior to the entry of such decree, had or claimed a valid water right upon the stream or source of supply affected by such decree, or who subsequent to the entry of such decree has made a valid appropriation of water from said stream or source of water supply affected by such decree, may petition the court which entered such decree for an order making him a party to such decree and establishing his right thereunder, and in relation to the other rights affected by such decree. Upon filing such petition, such notice shall be given and procedure had as is provided in sections 89-829 to 89-834.

History: En. Sec. 2, Ch. 38, L. 1927.

"May," Not Mandatory

This section, declaring that a claimant may petition the district court for an order making him a party to the decree and establishing his right thereunder, held not mandatory in the sense that if such party fails to take advantage of the permission granted, he will be barred from thereafter complaining. *State ex rel. McKnight v. District Court*, 111 M 520, 528, 111 P 2d 292.

Where Trial Court Ignored Predecessor's Claim

Where in a water right suit plaintiff relied upon the decree entered in a former action involving the same right as res judicata, in which defendants' predecessor appeared and answered making claim to a certain right but the trial court failed to make disposition of the claim and apparently ignored it, defendants were not barred by the former decree to have their right adjudicated. *Missoula Light & Water Co. v. Hughes*, 106 M 355, 374, 77 P 2d 1041.

89-836. (7125) Penalty for wrongful diversion of adjudicated waters.

Any person not a party, or privy, to a decree adjudicating the waters of a river, stream, ravine, coulee, spring, lake, or other natural source of supply, the same having been adjudicated, who shall divert the water thereof when the same shall be needed by another, without first complying with the terms of this act, shall be guilty of a misdemeanor and shall be punished by a fine of not less than ten dollars nor more than one thousand dollars.

History: En. Sec. 10, Ch. 228, L. 1921;
re-en. Sec. 7125, R. C. M. 1921.

Waters and Water Courses 78.
67 C.J. Waters § 162 et seq.

89-837. (7126) Penalty for noncompliance with act. Failure to comply with the provisions of this act deprives the appropriator of the right to use any water of such stream, or other source of supply, as against any subsequent appropriator mentioned in or bound by a decree of the court.

History: En. Sec. 11, Ch. 228, L. 1921;
re-en. Sec. 7126, R. C. M. 1921.

Waters and Water Courses 151.
67 C.J. Waters § 500 et seq.

89-838. (7127) Recording copy of final decree. A certified copy of the final decree of the court shall be filed with the county clerk, who shall make a record thereof as is provided therefor in section 89-816.

History: En. Sec. 12, Ch. 228, L. 1921;
re-en. Sec. 7127, R. C. M. 1921.

89-839. (7128) Effect of decree upon subsequent appropriations. Whenever there shall have been an adjudication of the rights between appropriators or claimants to any stream or any other water supply in this state, in any district court of the state, or the United States court, in an action prosecuted in good faith between such appropriators or claimants to determine their respective rights to the use of such waters, and which decree is based upon evidence introduced, and not upon stipulations or admissions of the parties, such adjudication and decree, or certified copies thereof, shall, as against all persons appropriating or diverting any of the waters of the said stream or other water supply, after the date of such decree, in an action relating to such waters, be prima facie evidence of the facts therein found, determined, and decreed, respecting the rights of parties to said action to the use of the waters of said stream or other water supply.

History: En. Sec. 1, Ch. 95, L. 1905;
re-en. Sec. 4867, Rev. C. 1907; re-en. Sec. 7128, R. C. M. 1921.

of a water right decree by the successor in interest of one made a party defendant by order of court in the water right suit, and against whom default had been entered, the judgment roll was admissible in evidence, this section being inapplicable under the facts of the case. *State ex rel.*

Contempt Proceedings—Admissibility of Judgment Roll

In a contempt proceeding for violation

Delmoe v. District Court, 100 M 131, 139, 46 P 2d 39.

Decrees Showing Anticipation of Future Needs

When the intention is made manifest, the court must take into consideration prospective or future needs in entering a water right decree, and mere description of lands does not justify the extended use of water in the absence of recitals in the pleadings and decree and proof in the record that appropriation is made in anticipation of future needs, and in reviewing the acts of the water commissioner in distributing water, in a proceeding had under sec. 89-1015, reasonable diligence must be shown to have been exercised since entry of the decree in developing such needs. *Quigley v. McIntosh*, 110 M 495, 505, 103 P 2d 1067.

Operation and Effect

Under this section the court in water right suits is not bound by a stipulation of the parties as to the general character

89-840. (7129) Appropriations of water subject to prior decrees adjudicating rights. All water hereafter appropriated by any person, association, company, or corporation, after the passage of this act, from any stream, creek, spring, canyon, river, or ravine in this state, in which the water rights therein have been adjudicated and decreed prior to the passage of this act, and a decree of a court of competent jurisdiction entered therein, shall be subject to such decree.

History: En. Sec. 1, Ch. 185, L. 1907; re-en. Sec. 4868, Rev. C. 1907; re-en. Sec. 7129, R. C. M. 1921.

Operation and Effect

Held, that Chapter 185, Laws of 1907 (sections 89-840 to 89-844), regulating the method by which appropriations of water from adjudicated streams could be made,

89-841. (7130) Nonadjudicated streams not affected. In all streams, creeks, springs, canyons, rivers, and ravines, in which the water rights therein have not been adjudicated by a court of competent jurisdiction, water shall be appropriated in the same manner as provided by law at the time of the passage of this act.

History: En. Sec. 2, Ch. 185, L. 1907; Sec. 4869, Rev. C. 1907; re-en. Sec. 7130, R. C. M. 1921.

and quality of the soil of their respective lands or the amount of water required for their successful and economical irrigation. *Allen v. Petrick et al.*, 69 M 373, 378, 222 P 451.

The opinion suggests that this section is not a provision of substantive law affecting water rights, that it could not relate to rights acquired prior to its passage and approval, whether acquired before or after the decree in question, and does not attempt to make decrees binding upon subsequent appropriators but merely makes them "prima facie evidence of the facts therein found"; it is applicable only to decrees in actions "prosecuted in good faith" and "based upon evidence introduced and not upon stipulations or admissions of the parties." *State ex rel. McKnight v. District Court*, 111 M 520, 527, 111 P 2d 292.

References

Anaconda Nat. Bank v. Johnson et al., 75 M 401, 410, 244 P 141.

was not, but that Chapter 228, Laws of 1921 (sections 89-829 to 89-838), amendatory thereof, is exclusive. *Donich et al. v. Johnson et al.*, 77 M 229, 244, 250 P 963.

Waters and Water Courses—140, 152 (11).

67 C.J. Waters §§ 439 et seq., 504 et seq.

References

Donich et al. v. Johnson et al., 77 M 229, 244, 250 P 963.

Waters and Water Courses—123.
67 C.J. Waters § 411.

89-842. (7131) Appropriations pending litigation subject to decree. At such time as there may be legal proceedings instituted by the owner or owners of any water right or water rights in any stream, spring, creek, canyon, river, or ravine, before any court of competent jurisdiction, all subsequent appropriations made in any such streams, creeks, springs, canyons,

rivers, or ravines will be subject to such suit as may be instituted and shall not date prior to the date of the beginning of said suit, and will be subject to the rulings and decisions thereunder.

History: En. Sec. 3, Ch. 185, L. 1907; Waters and Water Courses 140, 152 re-en. Sec. 4870, Rev. C. 1907; re-en. Sec. (11). 7131, R. C. M. 1921. 67 C.J. Waters §§ 439 et seq., 504 et seq.

89-843. (7132) Statutory measurements. Where water rights have been decreed in statutory or miner's inch measurement, the measurement shall be in cubic feet per second, and one hundred miner's or statutory inches shall be equivalent to a flow of two and one-half cubic feet per second, and this proportion shall be observed in determining the equivalent flow of any number of miner's or statutory inches.

History: En. Sec. 10, Ch. 185, L. 1907; re-en. Sec. 4877, Rev. C. 1907; re-en. Sec. 7132, R. C. M. 1921.

References

Quigley v. McIntosh, 110 M 495, 508, 103 P 2d 1067.

Weights and Measures 3.

68 C.J. Weights and Measures § 2.

89-844. (7133) Effect of decree. Any person or persons appropriating water under the provisions of this act shall be subject to, bound by, and shall comply with any decree of court adjudicating the waters of such stream, or any stream of which the same may be a tributary or feeder, as fully and to the same extent as if said person or persons were original parties to the action wherein the said decree is made and entered, and any water commissioner or commissioners, appointed by the court to distribute waters under any decree, shall have jurisdiction over and shall distribute any waters appropriated under the provisions of this act, according to priority.

History: En. Sec. 12, Ch. 185, L. 1907; Sec. 4879, Rev. C. 1907; re-en. Sec. 7133, R. C. M. 1921.

Presumption of Correctness When Relied Upon

Where, in a suit for damage to crops resulting from wrongful diversion of wa-

ter, the judgment in a former suit between the same parties was relied on in aid of the plea of *res judicata*, the disputable presumption is that the proceedings had in such suit were regular under sec. 93-1301-7, subd. 17. *Cocanougher v. Montana Life Insurance Co.*, 103 M 536, 543, 64 P 2d 845.

89-845. (7134) United States may take ditches by right of eminent domain. Where, in the course of the construction of irrigation works, the secretary of the interior, or any person or agent authorized to act in the premises, deems it necessary to use the right-of-way of any existing ditch, canal, or reservoir, such right and privilege may be enjoyed by the government of the United States under and subject to either of the following provisions, to-wit:

1. The existing ditch, canal, or reservoir may be condemned as provided by law.

2. The existing ditch, canal, or reservoir, after having been condemned as provided for by law, may be enlarged or extended by the United States without charge or cost to the owner or owners thereof; provided, that such enlargement or extension shall not be so made as to deprive any owner of such reservoir, ditch, or canal of the water rights and privileges owned or enjoyed at the time of such enlargement or extension, but such rights shall be and remain undiminished and unimpaired by, through, or

on account of such extension or enlargement, and the ownership or the right to the use and enjoyment of such water rights and privileges by any owner thereof in and through the enlarged or extended reservoir, canal, or ditch shall never be questioned by the United States, its successors or assigns, but shall be perpetually recognized and facilitated.

History: En. Sec. 1, Ch. 70, L. 1905; 117, 98 P 1081; Bailey v. Tintinger, 45 M re-en. Sec. 4891, Rev. C. 1907; re-en. Sec. 154, 167, 122 P 575.
7134, R. C. M. 1921.

References

Eminent Domain 5, 28.

Cited or applied as section 4891, Revised 29 C.J.S. Eminent Domain §§ 4, 18, 45, Codes, in Prentice v. McKay, 38 M 114, 46.

89-846. (7135) Appropriation of waters for use out of state—regulation.

None of the waters in the state of Montana shall ever be appropriated, diverted, impounded, or otherwise restrained or controlled while within the state for use outside the boundaries thereof, except pursuant to a petition to and an act of the legislative assembly of the state of Montana permitting such action, and any appropriation, diversion, impounding, restraining, or attempted appropriation, diversion, impounding, or restraining, contrary to the provisions of this act shall be null and void; and all officers, agents, agencies, and employees of the state are prohibited from knowingly permitting, aiding, or assisting in any manner such unauthorized appropriation, diversion, impounding, or other restraint. It shall be unlawful for any person, persons, or corporation, directly or indirectly, personally or through agents, officers, or employees, either to attempt to so appropriate, divert, impound, or otherwise restrain or control any of the waters within the boundaries of this state for use outside thereof, except in accordance with the terms of this act.

History: En. Sec. 1, Ch. 220, L. 1921; Waters and Water Courses 10, 132.
re-en. Sec. 7135, R. C. M. 1921. 67 C.J. Waters § 416.

89-847. Declaration of policy as to adjudication of waters of the state.

It is hereby declared to be the policy of this state and necessary for the welfare of the state and its citizens, that the waters of this state and especially interstate streams arising out of the state be investigated and adjudicated as soon as possible in order to protect the rights of water users in this state and negotiate interstate compacts in relation thereto, and that the state water conservation board and state engineer make investigations to secure necessary information and initiate and carry on actions therefor.

History: En. Sec. 1, Ch. 185, L. 1939. Waters and Water Courses 217.
67 C.J. Waters § 10 et seq.

89-848. State engineer may bring action to adjudicate waters. At the direction of the state water conservation board the state engineer is hereby authorized to bring action to adjudicate the waters of any stream or of any stream and its tributaries in any county traversed by said stream.

History: En. Sec. 2, Ch. 185, L. 1939.

89-849. Appointment of referee to take testimony. In said actions the state engineer, upon direction of the state water conservation board, or in any action pending for the adjudication of a water right, any party thereto, may make application to the court for the appointment of some competent

person or persons to act as a referee or referees in said cause and to take testimony therein, and the court may appoint a referee or referees who shall proceed as herein set forth. In said order of reference the court may submit to said referee or referees any or all issues of fact in said cause.

History: En. Sec. 3, Ch. 185, L. 1939.

89-850. Notice of application for appointment of referee. Prior to the appointment of such referee two weeks notice of said application and the name of the referee or referees as selected by said court shall be given or mailed to all parties who shall have appeared in said case. Said referee or referees need not be residents of the county in which said action is pending. Any party may object to the appointment of any person as referee on the same grounds as he may object to him as a trial juror as provided in section 93-5011 except that no objection shall be entertained because of nonresidence of referee in the county of such adjudication. The provisions of sections 93-5404 to 93-5407 and section 93-5409, shall govern and apply to referees in the actions herein described.

History: En. Sec. 4, Ch. 185, L. 1939.

89-851. Duties of state engineer—scope of examination of streams—surveys, reports, maps and plats may be introduced as evidence. The state engineer shall either before or after the bringing of such action upon direction of the state water conservation board or upon the direction of the court do all things, make all surveys, and perform all services required by said board in the securing of all necessary information and making same available to said board or others who may be interested therein including the courts of this state. The state engineer or some qualified assistant may proceed to make an examination of any stream or streams as required by said board and the works diverting therefrom, said examination to include the measurement of the discharge of said stream and of the carrying capacity of the various ditches and canals, an examination of the irrigated lands and an approximate measurement of the lands irrigated from the various ditches and canals, and to take such other steps and gather such other data and information as may be essential to the proper understanding of the relative rights of the parties interested, which said observation and measurement shall be reduced to writing and made a matter of record at his office, and it shall be the duty of the state engineer to make or cause to be made such maps or plats thereof as he shall deem necessary or shall be required by said board, and to file with said board a detailed report and copies of such maps or plats covering such information so acquired by him. Any or all such surveys, reports, maps and plats may be furnished to the judge of said court or the referee or referees mentioned herein and may be introduced as evidence in such proceedings; provided that the costs and expenses incurred in carrying out the provisions of this section shall be paid by the state water conservation board.

History: En. Sec. 5, Ch. 185, L. 1939.

89-852. Hearings by referee. Said referee or referees shall hold such hearings in said cause as may be necessary relating to the rights of the respective claimants to water upon any stream or streams, and shall take

testimony upon questions submitted to him or them and shall continue such hearing until completed, but the said referee or referees shall have power to adjourn the taking of testimony from time to time and from place to place to further the convenience of those interested. Such testimony shall be taken in accordance with established rules of evidence.

History: En. Sec. 6, Ch. 185, L. 1939.

89-853. Report of referee—recognition of decreed water rights. The report of the said referee or referees shall contain findings of fact upon the issues submitted but shall not contain conclusions of law. All evidence before said referee shall be transcribed and submitted to the court with the findings of such referees. In proceedings described herein, all vested and decreed water rights shall be herein recognized.

History: En. Sec. 7, Ch. 185, L. 1939.

89-854. District court procedure. After the conclusion of the taking of such testimony the said referee or referees shall file their findings of fact with the clerk of the district court wherein said action is pending which findings of fact shall remain on file and subject to investigation by parties interested therein. The clerk of court shall notify the parties or their attorneys by mail upon the filing of such findings of fact by the referee or referees. The parties shall have thirty days from the mailing of such notices during which time any party to said action may file in said court objections or exceptions to any such findings of fact. As to any findings to which no exceptions are filed, same may be adopted by the court as findings of said court. As to any findings to which objections are filed, the court shall consider such proposed findings together with the evidence in relation thereto and may adopt, reject, or modify such findings. The court may upon request or of its own motion make additional findings in said cause. All conclusions of law shall be determined by the court in the same manner as conclusions of law are determined by the court in any action to be tried before the court.

History: En. Sec. 8, Ch. 185, L. 1939.

89-855. Judgment. The court shall thereafter render its judgment and same shall be in full force and of the same effect as if all testimony had been taken directly by the court.

History: En. Sec. 9, Ch. 185, L. 1939.

CHAPTER 9

YELLOWSTONE RIVER COMPACT—RATIFICATION OF

Section 89-901. Yellowstone River Compact—approval.

89-902. Legislative and congressional approval necessary.

89-901. Yellowstone River Compact—approval. The legislative assembly of the state of Montana hereby approves and ratifies the compact designated as the "Yellowstone River Compact", dated at the city of Billings, state of Montana on the 18th of December, 1944, signed by Fred E. Buck, W. E. Ogden, P. F. Leonard, H. W. Bunston, Wesley A. D'Ewart, E. E. Tiffany, D. M. Manning, Chester E. Onstad, Paul J. Hagan and Axel Persson, as state representatives of the state of Montana on a compact com-

mission between the states of Montana, North Dakota and Wyoming; which compact is as follows:

YELLOWSTONE RIVER COMPACT

The state of Montana, the state of North Dakota, and the state of Wyoming, being moved by consideration of interstate comity, and desiring to remove all causes of present and future controversy between said states and between persons in one and persons in another with respect to the waters of the Yellowstone river and its tributaries, other than waters within or waters which contribute to the flow of streams within the Yellowstone National Park, and desiring to provide for an equitable division and apportionment of such waters, and to encourage the beneficial development and use thereof, have resolved to conclude a compact as authorized under the act of the congress of the United States of America, approved March 16, 1944 (Public No. 257, 78th congress, second session), for the attainment of these purposes, and to that end, through their respective governments, have named as their respective commissioners:

For the state of Montana:

Fred E. Buck	E. E. Tiffany
W. E. Ogden	D. M. Manning
P. F. Leonard	Chester E. Onstad
H. W. Bunston	Paul J. Hagan
Wesley A. D'Ewart	Axel Persson

For the state of North Dakota:

J. J. Walsh	M. M. Millhouse
Kenneth W. Simons	Frank P. Whitney
Einar H. Dahl	John T. Tucker

For the state of Wyoming:

L. F. Thornton	David G. Anderson
John Gonin	W. B. Snyder
Earl Bower	Mark N. Partridge
Ray Bower	L. C. Bishop
R. E. McNally	H. J. Paustian
E. J. Johnson	W. R. Holt
Ernest J. Goppert	

who, after negotiations participated in by Harold D. Comstock, appointed as the representative of the United States of America, have agreed upon the following articles, to-wit:

ARTICLE I

A. Where the name of a state is used in the compact, as a party thereto, it shall be construed to include the individuals, corporations, partnerships, associations, districts, administrative departments, bureaus, political subdivisions, agencies, persons, permittees, appropriators, and all others using,

claiming, or in any manner asserting any right to the use of the waters of the Yellowstone river system under the authority of said state.

B. Any individual, corporation, partnership, association, district, administrative department, bureau, political subdivision, agency, person, permittee, or appropriator authorized by or under the laws of a signatory state, and all others using, claiming, or in any manner asserting any right to the use of the waters of the Yellowstone river system under the authority of said state, shall be subject to the terms of this compact. Where the singular is used in this article, it shall be construed to include the plural.

ARTICLE II

A. The state of Montana, the state of North Dakota, and the state of Wyoming are hereinafter designated as "Montana", "North Dakota", and "Wyoming", respectively.

B. The terms "commission" and "Yellowstone river compact commission" mean the agency created as provided herein for the administration of this compact.

C. The term "Yellowstone river basin" means areas in Wyoming, Montana, and North Dakota drained by the Yellowstone river and its tributaries, and includes the area in Montana known as lake basin.

D. The term "Yellowstone river system" means the Yellowstone river and all of its tributaries, including springs and swamps, from their sources to the mouth of the Yellowstone river near Buford, North Dakota, except those portions thereof which are within or contribute to the flow of streams within the Yellowstone national park.

E. The term "tributary" means any stream which in a natural state contributes to the flow of the Yellowstone river, including interstate tributaries and tributaries thereof, but excluding those which are within or contribute to the flow of streams within the Yellowstone national park.

F. The term "interstate tributaries" means the Clarks Fork, Yellowstone river; the Big Horn river; the Tongue river; and the Powder river; whose confluences with the Yellowstone river are respectively at or near the city (or town) of Laurel, Big Horn, Miles City, and Terry, all in the state of Montana.

G. The term "point of diversion" means the point or place at which water is taken or removed from the channel of the Yellowstone river or from any tributary thereof.

H. The terms "divert" and "diversion" mean the taking or removing of water from the Yellowstone river or any tributary thereof when the water so taken or removed is not returned directly into the channel of the Yellowstone river or of the tributary from which it is taken.

I. The term "divertible flow" means the quantity of water that could be diverted from the stream flow above a designated point of measurement during a specified period of time. It is comprised of three elements: (a) the total net inflow to storage; (b) the total diversions; and (c) the remaining flow in the stream at the designated point of measurement for which the divertible flow is being determined. It is computed as follows:

The algebraic sum of:

(a) The quantity of water (in acre-feet) that flowed into reservoirs situated above the point of measurement during the specified period of time; less the outflow and diversions made directly from reservoirs (in acre-feet) during the same period; plus

(b) The quantity of water (in acre-feet) that was diverted from the stream above the point of measurement (including diversions made directly from reservoirs) during the specified period of time; plus

(c) The quantity of water in the stream (in acre-feet) that flowed past the point of measurement for which divertible flows are being determined during the specified period of time.

J. The term "mean divertible daily flow" means the average divertible flow occurring during a twenty-four hour period, beginning at 12:00 midnight.

K. The term "mean daily flow" at any point means the average stream flow occurring at that point during a twenty-four hour period, beginning at 12:00 midnight.

L. The term "beneficial use" is herein defined to be that use by which the water supply of a drainage basin is depleted when usefully employed by the activities of man, and includes water lost by evaporation, percolation, and other natural causes from streams, canals, ditches, irrigated areas, and reservoirs.

ARTICLE III

A. This compact is entered into by each signatory state in the exercise of its sovereign powers for a governmental purpose, and its provisions shall be administered by a commission, composed of one representative from each signatory state, to be known as the Yellowstone river compact commission. The state representatives on this commission shall be selected in such manner as each signatory state shall choose. The state engineer of each signatory state, or other similar official, shall be and act as the state representative on the commission at all times when a vacancy may exist thereon either from failure to designate a method of selection or otherwise. The president of the United States shall be requested by the commission to designate a representative of the United States to sit with such commission, and such representative of the United States, if designated by the president, shall, when present, act as chairman of the commission without vote.

B. The salaries and necessary expenses of each state representative shall be paid by the respective state; all other expenses incident to the administration of this compact not borne by the United States shall be allocated to and borne by each state as follows: One-fifth by the state of North Dakota; and two-fifths each by the states of Montana and Wyoming.

C. In addition to other powers and duties herein conferred upon the commission and the members thereof, the jurisdiction of the commission shall include the collection, correlation, and presentation of factual data, the maintenance of records having a bearing upon the administration of this compact, and, by unanimous action, the making of recommendations to the respective states upon matters connected with the administration of this compact. In connection with the performance of its duties hereunder, the

commission may employ such services and make such expenditures as may be reasonably necessary, within the limit of funds provided for that purpose by the respective states. The commission shall compile a report for each year ending September 30th, and shall transmit it to the governors of the signatory states on or before December 31st of that year.

D. The secretary of war; the secretary of the interior; the secretary of agriculture; the chairman, federal power commission; the chief, federal weather bureau, or comparable officers of whatever federal agencies may succeed to the functions and duties of these agencies, and such other federal officers and officers of appropriate agencies of the signatory states having services or data useful or necessary to the compact commission, shall co-operate, ex officio, with the commission in the execution of its duty in the collection, correlation, and publication of records and data necessary for the proper administration of the compact; and these officers may perform such other services related to the compact as may be mutually agreed on with the commission.

E. The commission shall have power to formulate rules of procedure, rules, and regulations, and to perform any and all acts it may find necessary to carry out the provisions of this compact, and to prescribe, issue, make, amend, and rescind such order, rules, and regulations. All rules of procedure, rules, and regulations of the commission shall be filed in the office of the state engineer of each signatory state and shall be kept in a convenient form for public inspection and examination during reasonable business hours.

F. The commission herein authorized shall have power to sue and be sued in its official capacity in any federal court of the signatory states, and may adopt and use an official seal which shall be judicially noticed.

ARTICLE IV

The commission shall itself, or in conjunction with other responsible agencies, cause to be established, maintained, and operated such suitable water gaging and evaporation stations as it finds necessary in connection with its duties.

ARTICLE V

A. The states of Montana, North Dakota, and Wyoming hereby agree that the waters of the Yellowstone river and its interstate tributaries shall be apportioned among said states as follows:

1. **Clarks Fork, Yellowstone River**

Each day, during the period May 1st to September 30th, inclusive, of each year, the first 1,600 acre-feet of mean divertible daily flow of the main stem of the Clarks Fork, Yellowstone river, determined immediately above the confluence of Rock creek with Clarks Fork in Montana, shall be divided fourteen (14) per cent to Wyoming and eighty-six (86) per cent to Montana; however, either state may temporarily divert, consume, or store for its beneficial use any unused part of the above flow allotted to the other, but no continuing right to such unused flow shall be established thereby. Un-

appropriated divertible daily flows in excess of 1,600 acre-feet occurring during the period May 1st to September 30th, inclusive, of each year, and all presently unappropriated flows occurring during the period October 1st to April 30th, inclusive, shall be subject to future appropriation for beneficial use within the Yellowstone river basin in Montana, North Dakota and Wyoming in accordance with the laws of said respective states.

2. Big Horn River (Exclusive of Little Horn River)

Each day during the period May 1st to September 30th, inclusive, of each year, after due consideration being given to all Indian-treaty-water rights of the lands in Wyoming and Montana served directly from the main stem of the Big Horn river, the first 15,000 acre-feet of mean divertible daily flow of the Big Horn river, determined at or near the Big Horn river bridge on U. S. highway 87 near Hardin, Montana, shall be divided ninety (90) per cent to Wyoming and ten (10) per cent to Montana; and the next 15,000 acre-feet of mean divertible daily flow shall be divided ninety-three (93) per cent to Wyoming and seven (7) per cent to Montana; provided, however, that either state may temporarily divert, consume, or store for its beneficial use any unused part of the above flows allotted to the other, but no continuing right to such unused flows shall be established thereby. Subject to Indian-treaty-water rights, the unappropriated divertible daily flows in excess of 30,000 acre-feet occurring during the period May 1st to September 30th, inclusive, of each year, and all presently unappropriated flows occurring during the period October 1st to April 30th, inclusive, shall be subject to future appropriation for beneficial use within the Yellowstone river basin in Montana, Wyoming and North Dakota in accordance with the laws of said respective states.

3. Tongue River

Each day during the period May 1st to September 30th, inclusive, of each year, the first 2,200 acre-feet of mean divertible daily flow of the Tongue river, determined at the lowest point of diversion on this stream, shall be divided seventy-two (72) per cent to Wyoming and twenty-eight (28) per cent to Montana; and the next 1,200 acre-feet of mean divertible daily flow shall be divided forty-three (43) per cent to Wyoming and fifty-seven (57) per cent to Montana: Provided, that either state may temporarily divert, consume, or store for its beneficial use any unused part of the above flows allotted to the other, but no continuing right to such unused flows shall be established thereby. Unappropriated divertible daily flows in excess of 3,400 acre-feet occurring during the period May 1st to September 30th, inclusive, and all presently unappropriated flows occurring during the period October 1st to April 30th, inclusive, of each year, shall be subject to future appropriation for beneficial use within the Yellowstone river basin in Wyoming, Montana, and North Dakota in accordance with the laws of said respective states.

The provisions herein, and each of them, and in particular the allotments, and each of them, shall be subject to the following conditions:

(a) For the purpose of determining the engineering feasibility, particularly as to water supply, of any project or program of the United States for the further conservation and utilization of the waters of the Tongue

river, particularly the storage of waters in the state of Wyoming for beneficial use in that state, the allotments hereinabove made, and each of them, may be assumed as the measure of an equitable apportionment of the waters of the Tongue river between the states of Wyoming and Montana to satisfy, as of the date of this compact, those established rights for beneficial consumptive uses which are exercised beneficially and which are valid under the laws of the states of Wyoming or Montana, as the case may be.

(b) Such provisions and allotments shall become operative either ten (10) years from and after the date that this compact is ratified by the congress; or on June 15 of the year in which water is available for release through any adequate distributory system, other than the stream bed, from the Tongue river reservoir of the Montana water conservation board for beneficial uses in Montana, the amount of water so released, however, shall be equal to at least one-half of the working capacity of such reservoir; or on June 15 of the year in which water is available for release through any adequate distributory system, other than the stream bed, if such be necessary, from any storage reservoir constructed in Wyoming to conserve for beneficial uses in Wyoming the waters of the Tongue river, the amount of water released, however, shall be equal to at least one-half of the working capacity of such reservoir; or whichever of said dates is the earlier.

4. Powder River (Exclusive of Little Powder River)

Each day during the period May 1st to September 30th, inclusive, of each year, the first 2,000 acre-feet of mean divertible daily flow of the Powder river, determined at the Wyoming-Montana state line, shall be divided ninety-six and one-half (96½) per cent to Wyoming and three and one-half (3½) per cent to Montana: Provided, that when in the judgment of the compact commission the carriage loss in and through the stream bed depletes the divertible flow to such an extent that an unreasonable waste of water would result if Wyoming were regulated to produce such percentage to Montana, then such regulation shall be enforced only to the extent directed by the commission. The next 2,600 acre-feet of mean divertible daily flow shall be divided sixty (60) per cent to Wyoming, and forty (40) per cent to Montana; however, either state may temporarily divert, consume, or store for beneficial use any unused part of the above flows allotted to the other, but no continuing right to such unused flows shall be established thereby. Unappropriated divertible daily flows in excess of 4,600 acre-feet occurring during the period May 1st to September 30th, inclusive, and all presently unappropriated flows occurring during the period October 1st to April 30th, inclusive, of each year, shall be subject to future appropriation for beneficial use within the Yellowstone river basin in Montana, Wyoming, and North Dakota in accordance with the laws of said respective states.

5. Yellowstone River—Main Stem (Near Montana-North Dakota State Line)

During the period May 1st to September 30th, inclusive, of each year, lands within the Yellowstone river basin in Montana and in North Dakota below Intake, Montana, shall be entitled to the beneficial use of the available residual flow of the waters of the Yellowstone river below Intake, Montana, on a pro rata basis of acreage irrigated.

All residual flows of the Yellowstone river below Sidney, Montana, after the states of Montana and Wyoming have made, or may make, full beneficial use of the waters of said stream, is hereby allotted to the state of North Dakota.

B. From time to time following the consummation of this compact, the commission shall re-examine the allocations made under part "A" of this article and shall, after reaching unanimous agreement, make such modifications in these allotments as are fair, just, and equitable, giving consideration among other factors to:

- (a) priorities of water rights;
- (b) acreage irrigated;
- (c) acreage irrigable under existing works; and
- (d) potentially irrigable lands.

Provided, that if the commission should fail to reach unanimous agreement as to the modification of any allotment provided for in this article, then, as to the stream affected, the allotment then existing shall continue in full force and effect until unanimous agreement thereon be reached; and

Provided further, that changes and amendments that are substantive and are not modifications of allotments as herein provided shall be subject to Article XI.

C. The allocations made herein shall be exclusive of the use of the waters for domestic and stock use, and each signatory state shall be allowed unrestricted use for these purposes, except that no reservoir for such use shall exceed 20 acre-feet in capacity.

D. It is recognized that variable climatic conditions, stream flow regulation, the administration of the interstate tributaries in Wyoming and Montana, and other causes will produce diurnal and other unavoidable variations and fluctuations in the stream flows at the interstate measuring stations, and it is agreed that in the performance of provisions of part "A", of this article and subsequent modifications thereof, minor compensating irregularities and fluctuations in the flow shall be permitted; but where any deficiency of the mean daily flow at an interstate measuring station may be occasioned by neglect, error, or failure in the performance of the duty of the upstream-state water officials having charge of the administration of the diversions from the stream, each such deficiency shall be made up within the next succeeding period of 72 hours by delivery of additional flow at the interstate measuring station over and above the amount allotted, sufficient to compensate for such deficiency. Notwithstanding the allocations of this compact, the commission, in its administration, shall direct the regulation of the streams within each of the signatory states to avoid unreasonable carriage losses.

ARTICLE VI

Present vested rights within each state and between states relating to the beneficial use of the waters of the Yellowstone river system are recognized by this compact and shall be administered by the proper officials of the respective states. All rights to the beneficial use of the waters of the Yellowstone river system, heretofore and hereafter established under the laws of any signatory state, shall be satisfied solely from the portion of

the water allotted to that state as provided in Article V. All Indian treaty rights pertaining to the waters of the Yellowstone river basin are unaffected by this compact and are excluded therefrom.

ARTICLE VII

A. A lower signatory state shall have the right, by compliance with the laws of an upper signatory state, to file application for and receive permits to appropriate and use any waters in the Yellowstone river system not specifically apportioned to or appropriated by such upper state as provided in Article V; and to construct or participate in the construction and use of any dam, storage reservoir, or diversion works in such upper state for the purpose of conserving and regulating water that may be apportioned to or appropriated by the lower state, provided that such right is subject to the rights of the upper state to control, regulate, and use the water apportioned to and appropriated by it; and, provided further, that should an upper state elect, it may share in the use of any such facilities constructed by a lower state to the extent of its reasonable needs upon assuming or guaranteeing payment of its proportionate share of the cost of construction, operation, and maintenance. This provision shall apply with equal force and effect to an upper state in the circumstance of the necessity of the acquisition of rights by an upper state in a lower state.

B. Each claim hereafter initiated for an appropriation of water in one signatory state for use in another signatory state shall be filed in the office of the state engineer of the signatory state in which the water is to be diverted, and a duplicate copy of the application including a map showing the character and location of the proposed facilities and the lands to be irrigated shall be filed in the office of the state engineer of the signatory state in which the water is to be used. If a portion or all the lands proposed to be reclaimed are located in a state other than the one in which the water is to be diverted, then, before approval of the application shall be granted, said application shall be checked against the records of the appropriate office of the state in which the water is to be used, and a notation shall be placed thereon by the officer in charge of such records to the effect that the land description does not indicate a conflict with existing water rights. All endorsements shall be placed on both the original and duplicate copies of all such maps filed, to the end that the records in both states may be complete and identical.

C. Appropriations may hereafter be adjudicated in the state in which the water is diverted, and where a portion or all of the lands irrigated are in another signatory state, such adjudication shall be confirmed in that state by the proper authority. Each adjudication is to conform with the laws of the state where the water is diverted and shall be recorded in the county and state where the water is used.

ARTICLE VIII

A lower signatory state shall have the right, upon compliance with the laws of an upper signatory state, to acquire in such upper state by purchase, or through exercise of the power of eminent domain, such easements and

rights of way for the construction, operation, and maintenance of pumping plants, storage reservoirs, canals, conduits, and appurtenant works as may be required for the enjoyment of the privileges granted herein to such lower state. This provision shall apply with equal force and effect to an upper state in the circumstance of the necessity of the acquisition of rights by an upper state in a lower state.

ARTICLE IX

Should any facilities be constructed by a lower signatory state in an upper signatory state under the provisions of Article VII, the construction, operation, repairs, and replacements of such facilities shall be subject to the laws of the upper state. This provision shall apply with equal force and effect to an upper state in the circumstance of the necessity of the acquisition of rights by an upper state in a lower state.

ARTICLE X

In the event water from another drainage basin shall be imported into the Yellowstone river basin or transferred from one tributary basin to another by the United States, Montana, North Dakota, or Wyoming, or any of them jointly, the state having the right to the use of such water shall be given proper credit therefor in determining its share of the divertible flows apportioned in accordance with Article V herein.

ARTICLE XI

The provisions of this compact shall remain in full force and effect until amended in the same manner as it is required to be ratified to become operative as provided in Article XVII.

ARTICLE XII

No action taken by the compact commission shall be valid except by the unanimous consent of the commissioners representing the signatory states.

ARTICLE XIII

This compact may be terminated at any time by unanimous consent of the signatory states, and upon such termination all rights then established hereunder shall continue unimpaired.

ARTICLE XIV

Nothing in this compact shall be construed to limit or prevent any state from instituting or maintaining any action or proceeding, legal or equitable, in any federal court or the United States supreme court, for the protection of any right under this compact or the enforcement of any of its provisions.

ARTICLE XV

Nothing in this compact shall be construed as affecting any rights to the use of the waters of the Big Horn or Wind river and the Little Horn river and their tributaries, existing by virtue of Indian treaties.

The physical and other conditions characteristic of the Yellowstone river and peculiar to the territory drained and served thereby and to the development thereof, have actuated the signatory states in the consummation of this compact, and none of them, nor the United States by its consent and approval, concedes thereby the establishment of any general principle or precedent with respect to other interstate streams.

This compact shall become operative when approved by the legislature of each of the signatory states and consented to and approved by the congress of the United States.

(c) To subject any property of the United States, its agencies, or instrumentalities, to the laws of any state to an extent other than the extent to which these laws would apply without regard to the compact.

/s/ Fred E. Buck /s/ W. E. Ogden
(Fred E. Buck) (W. E. Ogden)

/s/ <i>P. F. Leonard</i> (P. F. Leonard)	/s/ <i>D. M. Manning</i> (D. M. Manning)
/s/ <i>H. W. Bunston</i> (H. W. Bunston)	/s/ <i>Chester E. Onstad</i> (Chester E. Onstad)
/s/ <i>Wesley A. D'Ewart</i> (Wesley A. D'Ewart)	/s/ <i>Paul J. Hagan</i> (Paul J. Hagan)
/s/ <i>E. E. Tiffany</i> (E. E. Tiffany)	/s/ <i>Axel Persson</i> (Axel Persson)

Commissioners for the State of North Dakota :

/s/ <i>J. J. Walsh</i> (J. J. Walsh)	/s/ <i>M. M. Millhouse</i> (M. M. Millhouse)
/s/ <i>Kenneth W. Simons</i> (Kenneth W. Simons)	/s/ <i>Frank P. Whitney</i> (Frank P. Whitney)
/s/ <i>Einar H. Dahl</i> (Einar H. Dahl)	/s/ <i>John T. Tucker</i> (John T. Tucker)

Commissioners for the State of Wyoming:

/s/ <i>L. F. Thornton</i> (L. F. Thornton)	/s/ <i>David G. Anderson</i> (David G. Anderson)
/s/ <i>John Gonin</i> (John Gonin)	/s/ <i>W. B. Snyder</i> (W. B. Snyder)
/s/ <i>Earl Bower</i> (Earl Bower)	/s/ <i>Mark N. Partridge</i> (Mark N. Partridge)
/s/ <i>Ray Bower</i> (Ray Bower)	/s/ <i>L. C. Bishop</i> (L. C. Bishop)
(R. E. McNally)	(H. J. Paustian)
(E. J. Johnson)	/s/ <i>W. R. Holt</i> (W. R. Holt)
/s/ <i>Ernest J. Goppert</i> (Ernest J. Goppert)	

I have participated in the negotiation of this compact and intend to report favorably thereon to the congress of the United States.

/s/ *Harold D. Comstock*
Harold D. Comstock

Representative of the United States of America.

History: En. Sec. 1, Ch. 85, L. 1945.

89-902. Legislative and congressional approval necessary. Said compact shall not be binding or obligatory upon any of the high contracting parties thereto unless and until the same shall have been approved by the legislature of each of the said states and by the congress of the United States. The governor of Montana shall give notice of the ratification and

approval of said compact by the twenty-ninth legislative assembly of the state of Montana to the governors of each of the remaining signatory states and to the president of the United States.

History: En. Sec. 2, Ch. 85, L. 1945.

CHAPTER 10

WATER COMMISSIONERS—DETERMINATION OF JOINT RIGHTS

- Section 89-1001. Appointment of water commissioners—authority—compensation.
 89-1002. Appointment of commissioners to admeasure and distribute waters.
 89-1003. Oath and bond of water commissioners.
 89-1004. Term of office of water commissioner.
 89-1005. Power of commissioners in distributing water—expenses.
 89-1006. Maintenance and repair of ditches or systems.
 89-1007. Failure to perform duty a contempt of court.
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 89-1009. Record of daily distribution of water.
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 89-1011. Telephone expenses.
 89-1012. Apportionment of fees and expenses.
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 89-1015. Complaint by dissatisfied user—procedure on.
 89-1016. Users to maintain headgates and measuring devices.
 89-1017. Action to determine rights to use of water as between partnership, tenants in common or corporation.
 89-1018. Appointment of commissioner to distribute water during pendency of action.
 89-1019. Oath of commissioner—division of water.
 89-1020. Authority of commissioner.
 89-1021. Compensation of commissioner—distribution of expense.
 89-1022. Interference with duties of commissioner a contempt.
 89-1023. Appointment of water commissioner after final decree—distribution of water—proviso.
 89-1024. Compensation of commissioner—apportionment—lien—execution—taxation of costs.

89-1001. (7136) Appointment of water commissioners — authority — compensation. (1) Whenever the rights of persons to use the waters of any stream, ditch or extension of ditch, water course, spring, lake, reservoir, or other source of supply have been determined by a decree or decrees of a court of competent jurisdiction, it shall be the duty of the judge of the district court having jurisdiction of the subject matter, upon the application of the owners of at least fifteen per cent of the water rights affected by the decree or decrees, in the exercise of his discretion, to appoint one or more commissioners, who shall have authority to admeasure and distribute to the parties bound by the decree or decrees the waters to which they are entitled; according to their rights as fixed by such decree or decrees.

(2) The state water conservation board or any person or corporation operating under contract with said board, or any other owner of stored waters may petition the court to have such stored waters distributed by the water commissioners appointed by said court. The court may thereupon make an order requiring the commissioner or commissioners appointed by the court to distribute such stored water when and as released to water users entitled to the use thereof.

(3) Upon the issuance of such order the water commissioner or commissioners shall have authority and it is hereby made his or their duty to admeasure and distribute to the users thereof as their interests may appear and be required, the stored and supplemental waters stored and as released by the state water conservation board under provisions of the state water conservation act, chapter 1 of this Title, to be diverted into and through said streams, ditch or extension of ditch, water course, spring, lake, reservoir, or other source of supply in the same manner and under the same rules and regulations as decreed water rights are admeasured and distributed, and such water commissioner or commissioners and the owners and users of such stored and supplemental waters shall be bound by and be subject to the provisions of this chapter, and all acts amendatory thereof and supplemental thereto, provided that the admeasurements and distribution of such stored and supplemental waters shall in no way interfere with decreed water rights. The purpose of this act is to provide a uniform, equitable and economical distribution of adjudicated, stored and supplemental waters.

(4) At the time of the appointment of such water commissioner or commissioners the district court shall fix their compensation, and the owners and users of decreed, stored and supplemental waters shall pay their proportionate share of such fees and compensation.

History: Earlier acts relating to water commissioners were Secs. 1 to 3, pp. 136 and 137, Laws of 1899, and chapter 64, Laws of 1905. These acts appeared as sections 4881 to 4889, Revised Codes 1907, and were repealed by chapter 43, Laws of 1911. This section en. Sec. 1, Ch. 43, L. 1911; re-en. Sec. 7136, R. C. M. 1921; amd. Sec. 1, Ch. 125, L. 1925; amd. Sec. 1, Ch. 187, L. 1939.

Contempt in County Other Than Where Decree Made

Where the violation of the decree of the district court of Cascade county was committed in Lewis and Clark county, the courts of Lewis and Clark county may punish therefor. Contempts, being criminal in their nature, must be tried in the county where committed. *State ex rel. Swanson v. District Court*, 107 M 203, 209, 82 P 2d 779.

Contempt Proceeding Not Procedure to Adjudicate Water Rights

Water commissioner does not possess complete and exclusive jurisdiction to control the stream, regardless of whether all rights are adjudicated under court decree fixing measurement of water, nor may the district court in contempt proceeding summary in nature, decide contemnor claiming right in stream, otherwise adjudicated, has no right. This may be done only by appropriate action after due notice and hearing. *State ex rel. Reeder v. District Court*, 100 M 376, 381, 47 P 2d 653.

Operation and Effect

A person not mentioned in the decree, who signs a petition for the appointment of the water commissioner, and afterward refused to respect the decree, makes himself a party thereto, and is liable to be punished in contempt proceedings. *State ex rel. Pool v. District Court*, 34 M 258, 267, 86 P 798.

Under the rule that a special statutory remedy is not exclusive but cumulative only, unless the intention to make it so is clearly manifest or it is entirely adequate for the protection of pre-existing rights, held, that this Act providing for the appointment of a water commissioner and prescribing his duties and powers, does not provide an exclusive remedy for one whose water rights have been impaired and therefore does not preclude him from maintaining an action for damages. *Tucker v. Missoula Light & Ry. Co. et al.*, 77 M 91, 97, 250 P 11.

In a proceeding brought under this Act, relating to the appointment and duties of water commissioners, by one owning or using an adjudicated water right who is dissatisfied with the method of distribution of the waters in a stream by a commissioner, a formal trial, upon pleadings filed by the interested parties, is not contemplated; the only pleading required is the complaint, and the sole question for determination is whether the commissioner has distributed the waters in accordance with the decree; other users may present themselves at the hearing and resist the

demands of complainant orally if they object to the granting of relief. *Gans & Klein Invest. Co. v. Sanford et al.*, 91 M 512, 515, 2 P 2d 808.

Held, on certiorari, that land owner not a party to original water right suit nor successor in interest of a party thereto, but claimed a right under an appropriation the legality of which had not been subject of litigation, and when advised by water commissioner that water in stream insufficient for needs of those with decreed rights, continued in its use, finding that he was guilty of contempt not warranted in absence of showing that he interfered with commissioner in performance of his duties. *State ex rel. Reeder v. District Court*, 100 M 376, 381, 47 P 2d 653.

Procedure under Montana statutes authorizing owner or user of waters of an adjudicated stream who is dissatisfied with method of distribution to file written claim in appropriate court, and providing for a hearing and making of appropriate findings and orders, is not a formal trial but is more in nature of proceedings ancillary to original decree adjudicating rights on

the stream. *Sain et al. v. Montana Power Co.*, 84 F 2d 126, 128.

River and Tributaries Flowing in Several Counties

Where a river and its tributaries flowed in three counties, the district court of any one of such counties had jurisdiction to adjudicate the water rights on the whole watershed, and the court which first acquired jurisdiction retained it for the purpose of disposing of the whole controversy no court of co-ordinate power being at liberty to interfere with its action. Such court "having jurisdiction" appoints the water commissioner to enforce its decree; this rule not applying to rights not adjudicated in that decree. *State ex rel. Swanson v. District Court*, 107 M 203, 206, 82 P 2d 779.

References

Quigley v. McIntosh, 110 M 495, 498, 103 P 2d 1067.

Waters and Water Courses 133, 152.

67 C.J. *Waters* §§ 422 et seq., 504 et seq.

89-1002. (7137) Appointment of commissioners to admeasure and distribute waters. When the judge of the district court shall appoint two or more commissioners to admeasure and distribute the waters mentioned in the preceding section, he may appoint one of them chief commissioner, and empower him to exercise direction and control over the other or others in the discharge of their duties. The judge may depose the one appointed chief commissioner from that position, and appoint another in his stead, whenever it appears to the judge that better service may be given the water users by making the change.

History: En. Sec. 2, Ch. 43, L. 1911; re-en. Sec. 7137, R. C. M. 1921.

89-1003. (7138) Oath and bond of water commissioners. Each water commissioner so appointed by the court shall subscribe and file with the clerk of the district court an oath of office before commencing the discharge of his duties as commissioner, and shall likewise file with said clerk a bond executed by himself, with two or more sureties, in such sum as the judge of said court may designate, to insure the faithful discharge of his duties.

History: En. Sec. 3, Ch. 43, L. 1911; amd. Sec. 1, Ch. 12, Ex. L. 1919; re-en. Sec. 7138, R. C. M. 1921.

89-1004. (7139) Term of office of water commissioner. Every water commissioner so appointed shall hold his office for such time during the irrigating season of each year as may be designated by the judge in the order making such appointment; provided, that the judge shall not fix the date of commencing such term until requested in writing, by at least three persons entitled to the use of such waters, and may, in his discretion, or when

requested in writing by at least three of such persons entitled to use of such waters, change the time for the closing of the commissioner's service.

History: En. Sec. 4, Ch. 43, L. 1911;
amd. Sec. 1, Ch. 116, L. 1921; re-en. Sec.
7139, R. C. M. 1921.

89-1005. (7140) Power of commissioners in distributing water—expenses. Every water commissioner appointed by the judge of the district court for that purpose shall have the authority to admeasure and distribute to the parties interested, under such decree or decrees, the water to which those who are parties to the decree or decrees, or privy thereto, are entitled according to their priority as established by the decree or decrees. The water commissioner, in case the parties fail or refuse to do so, may incur necessary expenses in the making of headgates or dams for the distribution of the waters, and such expense shall be assessed against and paid by the party or parties for whom such services in the repair of the ditch or ditches, and the making of any dams or headgates, were necessary. Provided, that in the discretion of the court, such costs or expenses may be assessed against the land upon which or for the benefit of which such expense had been incurred.

History: En. Sec. 5, Ch. 43, L. 1911;
re-en. Sec. 7140, R. C. M. 1921; amd. Sec.
2, Ch. 125, L. 1925.

Court May Assess Lands in Another County

The district court of one county has power to make an assessment for costs and expenses against lands situated in another county benefited by appointment of a water commissioner, thereby creating liens upon such lands; such procedure is no more

objectionable than the statutory provision that a judgment rendered in one county is a lien upon real estate of the debtor in another county under sec. 93-5712. State ex rel. Swanson v. District Court, 107 M 203, 210, 82 P 2d 779.

References

State ex rel. Reeder v. District Court, 100 M 376, 382, 47 P 2d 653; State ex rel. Kruletz v. District Court, 110 M 36, 41, 98 P 2d 883.

89-1006. (7141) Maintenance and repair of ditches or systems. Upon written request of the owners of at least fifty-one per cent. of the water rights in any adjudicated ditch or single water system, the judge of the district court may empower the commissioner to maintain and keep in reasonable repair such water ditch or water system at the expense of the owners thereof, and for such purposes the commissioner shall have authority to enter and work upon any ditch, canal, aqueduct, or other source of conveying the waters affected by the decree, and the right-of-way thereof, and to visit, inspect, and adjust all headgates or other means of distribution of such waters.

History: En. Sec. 6, Ch. 43, L. 1911;
re-en. Sec. 7141, R. C. M. 1921.

89-1007. (7142) Failure to perform duty a contempt of court. If any commissioner shall fail to perform any of the duties imposed upon him by the order of the judge of the district court, he shall be deemed guilty of a contempt of said court.

History: En. Sec. 7, Ch. 43, L. 1911;
re-en. Sec. 7142, R. C. M. 1921.

Contempt \S 10.
17 C.J.S. Contempt \S 35.

89-1008. (7143) Further authority of commissioners—arrests. For the purposes of carrying out the provisions of this act, each commissioner ap-

pointed by the court shall have authority to enter upon any ditch, canal, aqueduct, or other source for conveying the waters affected by the decree, and to visit, inspect, and adjust all headgates, or other means of distributing the waters, and shall have the same powers as a sheriff or constable to arrest any and all persons interfering with the distribution made by him, to be dealt with according to law.

History: En. Sec. 8, Ch. 43, L. 1911;
re-en. Sec. 7143, R. C. M. 1921.

Operation and Effect

This section does not constitute water commissioners judicial officers in the sense that violations of their orders are contempts committed in the immediate view and presence of the court. *State ex rel. Flynn v. District Court*, 33 M 115, 117, 82 P 450.

It is true that under the authority vested in him by this section the commissioner may arrest an offender for interference with such distribution, and take him before the court for punishment, but such action does not in any manner compensate the party injured by the unlawful act of the culprit and therefore does not preclude him from maintaining an action for damages. *Tucker v. Missoula Light and Ry. Co. et al.*, 77 M 91, 98, 250 P 11.

Power of Commissioner Appointed in Another County

The fact that a water commissioner is by this section vested with the same power of arrest as is a sheriff or constable, whose powers are confined to their counties, does not militate against the holding that the district court of one county may appoint a commissioner in another county to which his duties are wholly confined; one violating a water right decree will not be heard to say that his arrest should have been accomplished by some other officer. *State ex rel. Swanson v. District Court*, 107 M 203, 210, 82 P 2d 779.

References

State ex rel. Reeder v. District Court, 100 M 376, 382, 47 P 2d 653.

89-1009. (7144) Record of daily distribution of water. Each water commissioner must keep a daily record of the amount of water distributed to each water user, and must file a summary of such record with the clerk of the court monthly, during his term of service, showing in detail the total amount of water distributed to each water user during such month daily, and the amount of cost therefor, based upon the water commissioner's or commissioners' salary per day and the proportionate amount of water distributed. When two or more water commissioners serve under the same decree or decrees by order of the judge, they may file a joint summary of their record with the clerk of the court, or the chief commissioner, if one has been appointed by the judge, may file a summary in behalf of all of them.

History: En. Sec. 9, Ch. 43, L. 1911;
re-en. Sec. 7144, R. C. M. 1921.

89-1010. (7145) Charges and expenses. The judge may also allow as a charge any expenses necessarily incurred by the water commissioner in the discharge of his duties in the employment of extra labor for the repair of dams, headgates, ditches, or flumes, when immediate action is necessary to preserve the rights of the parties entitled to the waters of such stream or when the judge has, in the order appointing the commissioner, required the commissioner to repair ditches, and keep in repair necessary headgates, ditches, or flumes. The water commissioner shall report all such expenses, and the cost thereof shall be taxed against the party or parties for whose benefit the same were incurred, provided, that in the discretion of the court, such costs or expenses may be assessed against the land upon which or for the benefit of which such expense had been incurred.

History: En. Sec. 10, Ch. 43, L. 1911; re-en. Sec. 7145, R. C. M. 1921; amd. Sec. 3, Ch. 125, L. 1925. **References** State ex rel. Swanson v. District Court, 107 M 203, 210, 82 P 2d 779.

89-1011. (7146) Telephone expenses. The judge may also allow as a charge reasonable expenses incurred by a water commissioner in telephoning to the judge for instructions in cases of emergency; and when there are two or more commissioners acting under the judge's order, reasonable expenses incurred in communicating with each by telephone, or with the judge of the district court, in order to carry on the distribution of the waters harmoniously and in accordance with the decree, shall be deemed a necessary expense. These expenses shall be reported by the water commissioner or commissioners at the close of the season, and shall be taxed against all the water users affected by the decree or decrees ratably in proportion to the whole amount of water distributed to them during the season.

History: En. Sec. 11, Ch. 43, L. 1911; re-en. Sec. 7146, R. C. M. 1921.

89-1012. (7147) Apportionment of fees and expenses. Upon the filing of the report by the water commissioner, or water commissioners, the clerk of court shall forthwith notify each person mentioned in such report, by letter, of the amount he is made liable for by such report, and that objections to such report, and the amount so taxed against him, may be made by any person interested therein, within twenty days after the date of the mailing of said notice, and unless objections thereto are filed, an order will be made by the judge of said court finally fixing and determining the amount due from each of said water users. The affidavit of the clerk that he has mailed a notice to each person mentioned in the report at such person's last known post office address, in the usual manner, shall be deemed prima facie evidence that the person received that notice provided for in this section.

History: En. Sec. 12, Ch. 43, L. 1911; re-en. Sec. 7147, R. C. M. 1921; amd. Sec. 1, Ch. 11, L. 1923; amd. Sec. 1, Ch. 45, L. 1927. **References** State ex rel. Swanson v. District Court, 107 M 203, 210, 82 P 2d 779.

89-1013. (7148) Objections to expenses—retaxation and adjustment. At the expiration of the twenty days' notice as provided for in the preceding section, if objections to said report have been filed, or a motion to re-tax the same has been made, the court or judge shall fix a time for the hearing of such objections or motion to re-tax, which time of hearing shall be as soon as the judge or a court can conveniently hear the same. Any person objecting to said report shall be entitled to at least five days' notice of the date and time of such hearing. At such hearing the court or judge shall hear and determine the motion or objections, and shall make an order fixing and determining the amount found due from each of said water users to such commissioner or commissioners. In case no objections are filed within the twenty days as hereinbefore provided for, such order shall be made as a matter of course, and in either case said order shall be final determination of the matter.

History: En. Sec. 13, Ch. 43, L. 1911; re-en. Sec. 2, Ch. 11, L. 1923. **References** State ex rel. Swanson v. District Court, 107 M 203, 210, 82 P 2d 779.

89-1014. (7149) Effect of order fixing fees and compensation—lessees—issuance of execution. After the order of the court fixing the fees and compensation and expenses of the water commissioner is final, it shall have all the force and effect of a judgment as against the person to whom the water was admeasured, and for whose benefit it was used. When such expense of commissioner or commissioners has been assessed against the land for which such service of the commissioner or commissioners has been rendered, it shall constitute a lien against said land. Execution may issue upon the order as upon a judgment by direction of the court or judge upon the application of any person interested therein and provided further that the water commissioner, at his discretion, may withhold further admeasurement or distribution of water to any person otherwise entitled thereto, until such person shall have paid all fees, compensation and expenses of such water commissioner or commissioners, so fixed by the court and apportioned and charged to such person and likewise may withhold the admeasurement and distribution of water from any land against which there exists any such lien as aforesaid, until such lien shall have been fully discharged.

History: En. Sec. 14, Ch. 43, L. 1911;
re-en. Sec. 7149, E. C. M. 1921; amd. Sec.
4, Ch. 125, L. 1925; amd. Sec. 1, Ch. 39,
L. 1929.

References

State ex rel. Swanson v. District Court,
107 M 203, 210, 82 P 2d 779.

89-1015. (7150) Complaint by dissatisfied user—procedure on. Any person owning or using any of the waters of such stream or ditch or extension of ditch, who is dissatisfied with the method of distribution of the waters of such stream or ditch by such water commissioner or water commissioners, and who claims to be entitled to more water than he is receiving, or is entitled to a right prior to that allowed him by such water commissioner or water commissioners, may file his written complaint, duly verified, setting forth the facts of such claim. Thereupon the judge shall fix a time for the hearing of such petition, and shall direct that such notice be given to the parties interested in such hearing as the judge may deem necessary. At the time fixed for such hearing, the judge must hear and examine the complainant and such other parties as may appear to support or resist such claim, and also examine such water commissioner or water commissioners and witnesses as to the charges contained in said complaint. Upon the determination of the hearing, the judge shall make such findings and order as he may deem just and proper in the premises. If it shall appear to the judge that the water commissioner or water commissioners have not properly distributed the water according to the provisions of the decree, then the judge shall give the proper instructions for such distribution. The judge may remove such water commissioner or water commissioners and appoint some other person or persons in his or their stead, if he deems that the interests of the parties in the waters mentioned in such decree will be best subserved thereby, and if it shall appear to the judge that the said water commissioner or water commissioners have wilfully failed to perform their duties, they may be proceeded against for contempt of court, as provided in contempt cases. The judge shall make such order as to the payment of costs of such hearing as may appear to him to be just and proper.

History: En. Sec. 15, Ch. 43, L. 1911; re-en. Sec. 7150, R. C. M. 1921; amd. Sec. 5, Ch. 125, L. 1925.

Appropriations in Anticipation of Future Needs

When the intention is made manifest, the court must take into consideration prospective or future needs in entering a water right decree, and mere description of lands does not justify the extended use of water in the absence of recitals in the pleadings and decree and proof in the record that appropriation is made in anticipation of future needs, and in reviewing the acts of the water commissioner in distributing water, in a proceeding under this section, reasonable diligence must be shown to have been exercised since entry of the decree in developing such needs. *Quigley v. McIntosh*, 110 M 495, 505, 103 P 2d 1067.

Diversion Into Fish Pond Without Outlet Constituting Unauthorized New Appropriation

Where, after the appointment of a water commissioner, there never was more than enough water in an adjudicated stream to supply the needs of the parties under their adjudicated rights, a diversion of water therefrom by one of them into a fish pond which had no outlet, constituted an attempted new appropriation under this section et seq., which in the absence of a decree establishing it, was unauthorized and therefore properly prohibited by an order of court in a proceeding under this section. *Quigley v. McIntosh*, 110 M 495, 502, 103 P 2d 1067.

Jurisdiction Federal Court May Entertain

That prior decree of state court settling water priorities in particular stream permanently enjoined parties thereto from interfering with rights of each other did not preclude federal court from entertaining jurisdiction of suit to have power company's rights adjudged inferior to plaintiffs', in view of holdings of state court authorizing independent actions, notwithstanding prior injunction; nor does the fact that state court had appointed a water commissioner, and through him was still exercising jurisdiction over the res, preclude exercise of jurisdiction, especially where state laws did not contemplate that his adjustment of water rights should be exclusive. *Sain et al. v. Montana Power Co.*, 84 F 2d 126, 128.

Operation and Effect

In a proceeding brought under this section, by a dissatisfied water user against a water commissioner appointed to admeasure

the waters of a tributary of a river, defendant's contention that his refusal to distribute water to plaintiff was justified by the fact that the tributary flowed entirely in his county and that therefore the district court of a neighboring county was without jurisdiction to render the decree upon which plaintiff relied as the basis of his water right was without merit. *Whitcomb v. Murphy*, 94 M 562, 566, 23 P 2d 980.

Questions to be Determined

In a proceeding under this section, the primary questions for consideration by the trial court are (1) What was adjudged in the former proceeding and decree? and (2) Was the water commissioner distributing the water in accordance with what was there adjudged? *Brennan et al. v. Jones et al.*, 101 M 550, 557, 566, 55 P 2d 697.

Purpose Not To Adjudicate Water Rights

The purpose of the summary proceeding authorized by this section is not to adjudicate water rights determined by prior decrees, nor, under the guise of instructions to the commissioner after hearing, to summarily subordinate the right of one to that of another where, as between the two, their rights have never been adjudicated; a water commissioner is as disinterested in such proceeding as a stakeholder or interpleader, and may not champion the rights of an owner whose rights have never been adjudicated and had no notice and did not appear at the hearing. *State ex rel. McKnight v. District Court*, 111 M 520, 524, 111 P 2d 292.

Real Parties In Interest

As in the case of an injunction action against a water commissioner, so in a proceeding under this section, the real parties interested are the parties whose water rights are affected in either instance. The constitutional right of due process cannot be abridged by the court's instructing the water commissioner in a manner subordinating the right of one to that of another to conform to a decree to which the former was not a party, merely because time and expense would be consumed in litigation between users whose rights between themselves have not been adjudicated. *State ex rel. McKnight v. District Court*, 111 M 520, 527, 111 P 2d 292.

Reference To Entire Record To Construe Obscure Or Uncertain Decree

In construing a water right decree which is lacking in certain elements or obscure and uncertain in meaning, the supreme court on appeal from orders of the district court in a proceeding had under this sec-

tion relating to the actions of a water commissioner in distributing water to claimants whose rights were adjudicated in prior decrees, may refer to the pleadings, judgment roll or the entire record of the case. *Quigley v. McIntosh*, 110 M 495, 510, 103 P 2d 1067.

Rule As To Extended Use of Water Irrespective Of The Rights Of Others

Held, that where changes have occurred since the decree, brought about by appellant's change of diversion to new places or areas, increased, additional or different uses of water, he may not contend that owners of decreed rights may use the water decreed to them no matter

how much they increase the use thereof on additional lands so long as they do not exceed their decreed quota per unit of time, to the injury of subsequent appropriators, as the limitation is based on water taken and beneficially applied on lands either in actual or contemplated irrigation at the time it was decreed. *Quigley v. McIntosh*, 110 M 495, 505, 103 P 2d 1067.

References

Tucker v. Missoula Light & Ry. Co. et al., 77 M 91, 97, 250 P 11; *Gans & Klein Invest. Co. v. Sanford et al.*, 91 M 512, 516, 2 P 2d 808.

89-1016. (7151) Users to maintain headgates and measuring devices.

All persons using water under a decree from any stream or ditch whereon a water commissioner is appointed shall be required to have suitable headgates at the point wherein a ditch taps a stream, and shall also, at some suitable place on the ditch, and as near the head thereof as practicable, place and maintain a proper measuring box, weir, or other appliance for the measurement of the waters flowing in such ditch. In case any person or persons shall fail to place or maintain a proper measuring appliance, it shall be the duty of such water commissioner not to apportion or distribute any water through said ditch. And provided further that the commissioner must notify all parties interested by registered mail or in person one week before making the annual repair or cleaning of any stream or ditch or performing necessary labor or expenses to divert water to any ditch. The sending of a registered letter to the last known post office address of any such interested party will be prima facie evidence of the fact that he was duly notified. Provided, however, that any work in the way of repairing a ditch made necessary by any emergency may be done without such notice when injury would result from delay.

History: En. Sec. 7, Ch. 64, L. 1905; re-en. Sec. 4890, Rev. C. 1907; re-en. Sec. 7151, R. C. M. 1921; amd. Sec. 6, Ch. 125, L. 1925.

Operation and Effect

This section requiring the installation of headgates and measuring boxes in ditches by persons using water from a stream under a decree where a water commissioner

has been appointed, is in the nature of a police regulation, under which the commissioner may refuse to distribute water to one who fails to do so, but does not license a stranger to appropriate water to his own use therefrom merely because an owner of a right has not complied with such requirement. *Tucker v. Missoula Light & Ry. Co. et al.*, 77 M 91, 99, 250 P 11.

89-1017. (7152) Action to determine rights to use of water as between partnership, tenants in common or corporation. Whenever a water ditch used for irrigating purposes is owned by a partnership, tenants in common, or corporation, and there is any dispute between the respective owners, tenants in common, or stockholders respecting the use and division of the waters flowing in said ditch, any partner, tenant in common, or stockholder may commence an action in any court of competent jurisdiction to determine the rights of the respective parties to the use of said waters, and may join in his petition a prayer for the appointment of a water commissioner to apportion and distribute the waters of said ditch, according

to the rights of the respective owners, tenants in common, or stockholders during the pendency of the action.

History: En. Sec. 1, Ch. 181, L. 1919;
re-en. Sec. 7152, R. C. M. 1921.

89-1018. (7153) Appointment of commissioner to distribute water during pendency of action. After the filing of the complaint in such action, the court may, upon five days' notice to the other parties to the action, appoint a commissioner to divide and distribute the waters of said ditch to the respective parties, according to their respective rights, during the pendency of the action; provided, however, that the court may, upon good cause shown, appoint such commissioner without notice; and provided further, that when such commissioner is appointed, without notice, any party to the action may, on five days' notice to the plaintiff, move the court or judge to vacate such appointment, or to modify the order as to the distribution of the waters of said ditch, and the court or judge on such hearing in his discretion may affirm, vacate, or modify the order previously made.

History: En. Sec. 2, Ch. 181, L. 1919;
re-en. Sec. 7153, R. C. M. 1921.

89-1019. (7154) Oath of commissioner—division of water. Each water commissioner so appointed shall subscribe to an oath of office before commencing the discharge of his duties. It shall be the duty of the water commissioner to divide the waters of said ditch between the owners, tenants in common, or stockholders, in proportion to their respective rights, as set forth in the complaint, or in such other manner or proportion as the court or judge may direct.

History: En. Sec. 3, Ch. 181, L. 1919;
re-en. Sec. 7154, R. C. M. 1921.

89-1020. (7155) Authority of commissioner. Such commissioner shall have authority to enter upon said ditch, and open, close, and set headgates, and do whatever else is necessary to apportion and distribute the waters of said ditch to the respective parties according to their respective rights.

History: En. Sec. 4, Ch. 181, L. 1919;
re-en. Sec. 7155, R. C. M. 1921.

89-1021. (7156) Compensation of commissioner—distribution of expense. The court shall fix the compensation of such commissioner and the term of his employment, and shall make an order apportioning the amount of such compensation among the several owners, tenants in common, or stockholders of said ditch, according to their respective rights and interest in said ditch, which amounts so apportioned shall be taxed as costs in the action against the respective parties.

History: En. Sec. 5, Ch. 181, L. 1919;
re-en. Sec. 7156, R. C. M. 1921.

89-1022. (7157) Interference with duties of commissioner a contempt. Any person opening or closing a headgate after being set by such commissioner, or who in any manner interferes with such commissioner in the dis-

charge of his duties, shall be deemed guilty of contempt of court, and may be proceeded against for contempt of court as provided in contempt cases.

History: En. Sec. 6, Ch. 181, L. 1919;
re-en. Sec. 7157, R. C. M. 1921.

89-1023. (7158) Appointment of water commissioner after final decree—distribution of water—proviso. When the rights of the respective parties in said action to the use of the waters flowing in said ditch shall be adjudicated, the judge of the district court having jurisdiction of the subject-matter, upon the application of the owners of at least ten per cent. of the waters of said ditch, may, in the exercise of his discretion, appoint a water commissioner to divide, apportion, and distribute the waters of said ditch to the respective parties, according to their respective rights as set forth in such decree; provided, that when a commissioner is appointed under the provisions of sections 89-1001 to 89-1015, to apportion and distribute the waters of the stream from which the water flowing in said ditch is taken, such commissioner shall, when so directed by the judge or court, apportion and distribute the waters of said ditch according to the decree by which the rights of the respective owners were adjudicated.

History: En. Sec. 7, Ch. 181, L. 1919;
re-en. Sec. 7158, R. C. M. 1921.

89-1024. (7159) Compensation of commissioner—apportionment—lien—execution—taxation of costs. When a commissioner is appointed upon the application of an owner or owners of such ditch, the court may fix the compensation of such commissioner and the term of his employment, and shall make an order apportioning the amount of such compensation among the several owner or owners, tenants in common or stockholders of said ditch, according to their respective rights and interest, which order shall have the force and effect of a judgment against the person to whom the water was admeasured and for whose benefit it was used, when, in the discretion of the court, such order of apportionment of expense is made against the land for which such water was used, in which event it shall have the force and effect of a lien against said land to which such apportionment was made. Execution may issue upon such order as upon a judgment by direction of the court, upon the application of any person interested therein; provided, however, that when a commissioner is appointed under the provisions of sections 89-1001 to 89-1015, to distribute the waters of the stream from which the waters flowing in said ditch are taken, and to apportion and distribute the waters of said ditch according to the rights of the respective owners thereof, the judge, in his discretion, may in addition to the apportionment taxed against the respective owners of the waters of said stream, apportion and tax the amount, if any, the owners of such ditch shall pay in addition to the amount taxed under the provisions of said sections 89-1001 to 89-1015.

History: En. Sec. 8, Ch. 181, L. 1919;
re-en. Sec. 7159, R. C. M. 1921; amd. Sec.
7, Ch. 125, L. 1925.

CHAPTER 11

WATER USERS' ASSOCIATIONS ORGANIZED UNDER FEDERAL LAW

- Section 89-1101. Power to levy new assessments.
 89-1102. Assessments to be equitable.
 89-1103. Transfer of shares of stock of water users' associations.
 89-1104. Assessment of shares of stock.
 89-1105. Division of irrigation project into districts and election of directors.
 89-1106. Vacancies in board of directors.

89-1101. (7160) Power to levy new assessments. Whenever any water users' association, having a contract with the United States government for construction of works and delivery of water, and also a contract with its shareholders, organized under and by virtue of the corporation laws of this state, and in conformity with the laws of the United States, shall have levied an assessment or assessments upon its capital stock, which assessment or assessments, or any part thereof, remain uncollected, such association shall have the power to discharge all assessments theretofore levied, and to levy in lieu thereof an assessment which shall include all previous assessments levied upon the shareholders of said association, and to give credit for all payments on assessments theretofore made.

History: En. Sec. 1, Ch. 141, L. 1917;
 re-en. Sec. 7160, R. C. M. 1921.

Fees of secretary of state, sec. 25-110.
 Recording papers, fee of county clerk,
 sec. 16-1101.

Cross-References

Exemption from franchise and corporation taxes, sec. 25-110.

Waters and Water Courses 238.
 67 C.J. Waters § 999.

89-1102. (7161) Assessments to be equitable. All assessments authorized hereunder shall be equitable and be based upon benefits received or available.

History: En. Sec. 2, Ch. 141, L. 1917;
 re-en. Sec. 7161, R. C. M. 1921.

89-1103. (7162) Transfer of shares of stock of water users' associations. Shares of stock of water users' associations, organized in conformity with the requirements of the laws of the United States and the state of Montana, and under the reclamation act of June 17, 1902, and which shares of stock, by the articles of incorporation of said association, are inseparably appurtenant to the lands for which they are subscribed, shall, upon the presentation of proof to such association of the transfer of any of said land, be transferred on the books of said association, by the proper officers of the association, to the grantee or successor in title to said land.

History: En. Sec. 1, Ch. 29, L. 1915;
 re-en. Sec. 7162, R. C. M. 1921.

89-1104. (7163) Assessment of shares of stock. The assessable stock of any such water users' association, heretofore mentioned, may at the time of any assessment made, after the major portion of such irrigation project is completed and the irrigable area thereunder determined, be one share for each irrigable acre, and appropriate by-laws of the association may provide for the discharge of assessments levied on stock appurtenant to lands then determined to be non-irrigable.

History: En. Sec. 2, Ch. 29, L. 1915;
 re-en. Sec. 7163, R. C. M. 1921.

89-1105. (7164) Division of irrigation project into districts and election of directors. Such water users' association shall be permitted to divide the area under such irrigation project into as many districts as there are directors provided for in its articles of incorporation, and each district shall elect one director for a term not to exceed five years; provided, however, that at the first election held to elect directors under the provisions of this act, each district shall elect one director, who shall hold office for such a term of years as the by-laws shall provide, and thereafter a director shall be elected in the district and at the annual election held just prior to the expiration of the term of office of the director of that district.

History: En. Sec. 3, Ch. 29, L. 1915;
re-en. Sec. 7164, R. C. M. 1921.

89-1106. (7165) Vacancies in board of directors. In case of a vacancy in the board of directors from any cause, the board shall fill such vacancy by appointment to hold to the end of that fiscal year, and a director shall be elected at the annual election in the district where such vacancy occurs to fill the unexpired term of such vacancy.

History: En. Sec. 4, Ch. 29, L. 1915;
re-en. Sec. 7165, R. C. M. 1921.

CHAPTER 12

IRRIGATION DISTRICTS—ORGANIZATION

- Section 89-1201. Creation of irrigation districts—percentage of titleholders required—what constitutes evidence of title—report of state engineer—payment of expenses.
- 89-1202. Petition for organization.
- 89-1203. Order and notice of hearing on petition.
- 89-1204. Hearing on petition and appointment of commissioners.
- 89-1205. Qualifications of commissioners and term of office—official bond.
- 89-1206. Organization of board of commissioners—officers—compensation—office of board to be designated.
- 89-1207. Meetings of the board.
- 89-1208. Salary of commissioners—penalty for interest in contract—bonds of commissioners.

89-1201. (7166) Creation of irrigation districts—percentage of titleholders required—what constitutes evidence of title—report of state engineer—payment of expenses. (1) Sixty per centum in number of the holders of title or evidence of title to lands sought to be included in an irrigation district and which are susceptible of irrigation, such holders of title or evidence of title also representing sixty per centum of the acreage of said lands, may propose the establishment and organization of an irrigation district under the provisions of this act; provided, however, that when any of such land sought to be included in such irrigation district is covered by mortgage or other lien then the owner or owners of such land shall first procure the written consent of the holder of such mortgage or other lien before proposing the establishment and organization of such irrigation district. Irrigation districts may be formed in order to cooperate with the United States under the federal reclamation laws heretofore or hereafter enacted, or under any act of congress which shall permit of the

performance by the United States of work in this state, for the purposes of construction of irrigation works, including drainage works, or for purchase, extension, operation, or maintenance of constructed works, or for the assumption, as principal or guarantor, of indebtedness to the United States on account of district lands. When so organized, such district shall have the powers conferred or that may hereafter be conferred, by law upon such irrigation district, provided, however, that (in) all irrigation districts organized in connection with United States reclamation projects a majority of the holders of title or evidence of title to lands sought to be included in such irrigation district under the provisions of the act, may propose the establishment and organization of such district.

(2) The certificate of the county clerk and recorder, or the certificate of the register of the state land office, shall be sufficient evidence of title for the purpose of this act. Where lands have been purchased from the state and part or all of the purchase money has been paid, but the patents or deeds from the state to such lands have not been issued, the receipt or receipts held by the purchasers, or the certificate of the register of the state land office showing the payments on account of purchase, shall be evidence of title to such lands under this act.

(3) Before any such district shall be established, there shall be presented to the district court at the hearing on the petition for such establishment, a written report or opinion from the state engineer on the engineering features involved and the possibilities of water supplies accompanied by a copy of the decree of the district court showing the adjudicated water rights in said streams from which said waters are to be diverted. For this purpose, a copy of the petition provided for in section 89-1202 and of all maps and other papers filed with the same, shall be filed with the state engineer at the time the original petition is filed with the clerk of the district court. The expense, if any, incurred by the state engineer (other than his salary), in his investigation and report upon the proposed district shall be certified, with his report, and that said engineer shall, within a period of one hundred twenty days from the filing of said petition with the state engineer, render his report, as herein provided, to the said district court, and shall be assessed as costs in said hearing, which costs shall be paid by the district in event of its establishment and in event such petition be denied, then such costs shall be paid by the petitioners; provided, however, that such report or opinion shall be not requested or obtained, and shall not be necessary, whenever it is proposed to cooperate with the United States under the federal reclamation laws heretofore or hereafter enacted, or under any act of congress which shall permit of the performance by the United States of work in this state, for the purposes of construction of irrigation works, including drainage works, or for purchase, extension, operation or maintenance of constructed works, or for the assumption, as principal or guarantor, of indebtedness to the United States on account of district laws.

History: The first irrigation district act was Ch. 70, L. 1907, appearing as Secs. 2309-2402, Rev. C. 1907; repealed by Ch. 146, L. 1909.

This section en. Sec. 1, Ch. 146, L. 1909; amd. Sec. 1, Ch. 153, L. 1917; amd. Sec. 1, Ch. 116, L. 1919; re-en. Sec. 7166, R. C. M. 1921; amd. Sec. 1, Ch. 157, L. 1923; amd. Sec. 1, Ch. 112, L. 1925.

Attacking Regularity of District

An action by a land owner seeking to have his irrigated land excluded from an irrigation district on the ground of lack of jurisdiction in the court when it entered its judgment creating it, because of failure of service of notice and lack of written consent to the inclusion of his lands, held not a collateral attack upon the judgment of creation. *Scilley v. Red Lodge-Rosebud Irr. Dist.*, 83 M 282, 272 P 543.

Constitutionality

Sections 89-1201 et seq. are not, in conferring certain alleged non-judicial powers and duties upon the district judge, violative of the provision of the constitution which divides the powers of government into the legislative, executive, and judicial departments. *O'Neill v. Yellowstone Irr. Dist.*, 44 M 492, 504, 121 P 283.

Construction of Act.

In ascertaining the intention of the legislature in enacting a statute, consisting of numerous sections all relating to the same general subject, the Act must be considered in its entirety, it having been passed as a whole, not in parts or sections. *Drake v. Schoregge et al.*, 85 M 94, 99, 277 P 627.

Id. After the organization of an irrigation district the provisions of the Act of its creation and rules of procedure should be given most liberal construction in order that the purpose of the Act may be carried out.

General Provisions

For general observations upon the character and objects of the legislation embraced in this chapter, see *In re Gallatin Irrigation District*, 48 M 605, 609, 610, 140 P 92.

Inclusion of State School Lands

The legislature has always assumed that it had authority to fix the policy as to whether state lands, as a matter of justice and equity, should be included in irrigation districts and subject to assessments, as was done by sec. 2401, R. C. M. 1907, sec. 4014, R. C. M. 1921, and ch. 58, L. 1929 (sec. 81-929). Secs. 2401 and 4014 supra were later repealed. In the instant case held, that sec. 4014 supra could not apply to a district created in 1911 under ch. 146, L. 1909, and in absence of specific legislation on the subject at the time plaintiff district was created, there was no authority for including state lands in the district subject to lien for assessments. *Tongue River and Yellowstone River Irrigation District v. Hyslop*, 109 M 190, 96 P 2d 273.

Jurisdiction of District Court

While the Irrigation District Act confers certain exclusive powers upon the district court of the county in which the business of the district is being conducted, there is nothing in the Act which gives exclusive jurisdiction to that court to compel the treasurer of that county by mandamus to pay interest due upon bonds of the district, and therefore, the court of any other district or county has the power to issue the writ. *State v. District Court et al.*, 69 M 415, 421, 222 P 444.

Nonconsenting Owners

Since the inclusion of a tract of land of a nonconsenting owner in an irrigation district and subjection of it to its pro rata part of the burden of the expense necessarily incident to the construction of the works and the operation of the system deprives him of his property to the extent of the burden thus imposed, such deprivation can be effected only by due process of law, i. e., he must be afforded adequate opportunity to be heard. *In re Crow Creek Irrigation District*, 63 M 293, 298, 207 P 121.

Public Corporation

Held, that an irrigation district created under this Act is a public corporation exercising essential governmental functions, one of which is the right to levy taxes, organized for the government of a portion of the state and for the promotion of the public welfare, and as such must be deemed a subdivision of the state within the meaning of section 25-209, relieving it, as such subdivision, from the payment of fees for the recordation of papers in the county clerk and recorder's office. *Crow Creek Irr. Dist. v. Crittenden*, 71 M 66, 69, 227 P 63.

What Land May Be Included

Under the District Irrigation Statutes, only such lands as will be specially benefited may be included within a proposed district against the will of the owner. *In re Crow Irrigation District*, 63 M 293, 298, 207 P 121.

References

Cited or applied as section 1, chapter 146, Laws of 1909, in *Billings Sugar Co. v. Fish*, 40 M 256, 272, 106 P 565; *In re Bitter Root Irr. Dist.*, 67 M 436, 438, 218 P 945; *State v. Nicholson*, 74 M 346, 354, 240 P 837; *Cosman v. Chestnut Valley Irr. Dist.*, 74 M 111, 238 P 879; *State v. McGraw*, 74 M 164, 240 P 817; *In re Fort Shaw Irr. Dist.*, 81 M 170, 261 P 962; *State et al. v. Board of Commissioners et al.*, 89 M 37, 296 P 1; *Blaser v. Clinton*

Irrig. Dist., 100 M 459, 461, 53 P 2d 1141;
Toole County Irrigation District v. State,
104 M 420, 429, 67 P 2d 989.

Waters and Water Courses ~~224~~, 225.
67 C.J. Waters § 862 et seq.
30 Am. Jur. 654, Irrigation, §§ 79-82.

89-1202. (7167) **Petition for organization.** For the purpose of establishing and organizing an irrigation district hereunder, a petition signed by the required number of holders of title or evidence of title to lands within such proposed district mentioned in the preceding section shall be filed with the clerk of the district court of the county in which the lands of the proposed district, or the greater portion thereof, are situated; provided, if there are three or more counties embraced in the proposed district, and no one county embraces the greater portion of said lands, then and in that event said petition shall be filed in the county which embraces a greater portion of said lands than any one of the other counties embraced in said proposed district. Such petition shall set forth:

1. The name suggested for the proposed district;
2. A general description of the lands to be included in the proposed district;
3. The names of the holders of title or evidence of title to the lands in the proposed district, ascertained in the manner mentioned in the preceding section; and if any such holder is a non-resident of the county or counties in which the proposed district lies, the postoffice address of such non-resident owner, if known;
4. Generally the source from which the lands in the proposed district are to be irrigated, the character of the works, water rights, canals, and other property proposed to be acquired or constructed for irrigation purposes in the proposed district;

5. A prayer that the lands embraced within the proposed district be organized as an irrigation district according to the provisions of this act.

The petition shall be accompanied by (1) a map or plat of the proposed district, and (2) a good and sufficient bond or undertaking, to be approved by the district court or judge thereof of the county in which the petition is required to be filed under the provisions of this act, to pay all costs in and about the proceedings preliminary to the organization of the district in the event that said organization shall not be effected.

Mere error or omission in the description of any lands or in the names of any of the holders of title or evidence of title to lands shall not operate to render invalid any proceedings hereunder, or to deprive the district court of jurisdiction of the subject-matter; provided, such misdescribed lands or misnamed persons shall not be included in said district.

History: En. Sec. 2, Ch. 146, L. 1909;
re-en. Sec. 7167, R. C. M. 1921.

Effect of Failure to Give Bond

Failure to give the bond required by this section does not affect the jurisdiction of the court, nor that of the commissioners appointed to conduct the affairs of the district, since it is merely designed as security for costs in the event the district is not organized. *O'Neill v. Yellowstone Irr. Dist.*, 44 M 492, 512, 121 P 283.

Requirements of Petition

Where a petition disclosed on its face that it was not signed by a majority of the landowners in the proposed district, an order dismissing it was proper, since it did not confer jurisdiction to create the district. *In re Gallatin Irrigation District*, 48 M 605, 607 et seq., 140 P 92.

Id. Where a petition is signed by only 32 landowners out of 63, among the latter being "Garnett Bros.," listed as one person, whereas the term includes three per-

sons, jurisdiction is not acquired, since when counted as three persons, a majority had not signed.

Id. Since a homestead or desert entryman does not have a taxable interest in land he holds, prior to final proof, his name cannot be counted in determining the sufficiency of a petition for the creation of an irrigation district.

Id. For the purpose of determining whether a petition meets the statutory requirements, the court is authorized to take testimony if necessary.

Id. In the hearing and determination of petitions, a wide discretion is lodged in the district court, an abuse of which, in refusing to permit a petition to be amended by the exclusion of lands and the addition of others, must be clearly shown before its action in dismissing a petition for insufficiency will be disturbed.

Witness Fees and Costs of Objectors to District

The allowance of mileage and per diem to witnesses who were present and ready to testify for the objectors to the creation of an irrigation district, and whose testimony would have been relevant, competent, and material, was proper, though they were not subpoenaed, sworn, or examined because of the dismissal of the petition for insufficiency. In *re* Gallatin Irrigation District, 48 M 605, 613, 614, 140 P 92.

References

Tomich v. Union Trust Co., 31 F 2d 515; *Blaser v. Clinton Irrigation District*, 100 M 459, 461, 53 P 2d 1141; *State ex rel. Swanson v. District Court*, 107 M 203, 211, 82 P 2d 779.

89-1203. (7168) Order and notice of hearing on petition. On such petition being filed, the district court or judge thereof shall make an order fixing the time and place of hearing on the petition and directing that notice thereof be given. Thereupon the clerk of said court shall cause to be published at least once a week for two successive calendar weeks in some newspaper published in the county where the said petition is filed, a copy of such petition, together with a notice stating the time and place, by the said district court fixed, when and where the hearing on said petition will be had; and if any portion of the lands within the proposed district lies within any other county or counties, then said petition and notice shall be published as above provided in a newspaper published in each such other county. If there be no newspaper published in such county, said petition and notice may be published in an adjoining county.

The first publication of said petition and notice shall be not less than thirty days prior to the time mentioned in said notice for said hearing.

If any holder of title or evidence of title to lands within the proposed district is a nonresident of the county or counties in which the proposed district lies, the clerk of said court shall, within three days after the first publication aforesaid, mail a copy of said petition and notice to each such nonresident whose postoffice address is stated in said petition.

The certificate of the clerk of the district court, under the seal of the court, as to the facts of the publishing and mailing of said petition and notice, affixed to a copy of said notice, shall be sufficient evidence of such facts.

History: En. Sec. 3, Ch. 146, L. 1909; re-en. Sec. 7168, R. C. M. 1921.

Character of Notice

The only notice required to be given under this section of the contemplated creation of an irrigation district was by publication or, in certain cases, by mail, hence the objection made by land owners on a hearing upon a petition of the district commissioners for confirmation of a contemplated contract, that they had not been

served with personal notice of the creation of the district had no merit. In *re* Fort Shaw Irr. Dist., 81 M 170, 180, 261 P 962.

Notice to Nonresident

Held, that the mailing of a copy of the petition for the creation of an irrigation district and notice of hearing to a non-resident land owner is an indispensable prerequisite to vesting the court with jurisdiction to create the district. *Scilley*

v. Red Lodge-Rosebud Irr. Dist., 83 M 282, 301 et seq., 272 P 543.

Sufficiency of Notice

This section provides that the clerk of the district court shall cause to be published at least once a week "for two successive calendar weeks" a notice of the time and place for hearing on a petition for the creation of an irrigation district. Held, that a notice published on March 31 and April 7 of a given year was a sufficient compliance with the requirement, the rule being under such a provision, that

publication for the number of times expressed in weeks, not more than seven days apart, suffices. *Scillely v. Red Lodge-Rosebud Irr. Dist.*, 83 M 282, 301 et seq., 272 P 543.

References

Cited or applied as section 3, chapter 146, Laws of 1909, in *O'Neill v. Yellowstone Irr. Dist.*, 44 M 492, 503, 121 P 283; *Tomich v. Union Trust Co.*, 31 F 2d 515; *First National Corp. v. Perrine et al.*, 99 M 454, 43 P 2d 1073.

89-1204. (7169) Hearing on petition and appointment of commissioners.

(1) At the time specified in the notice mentioned in the preceding section, the district court in which the petition aforesaid is filed shall hear the petition, but may adjourn such hearing from time to time, not exceeding three weeks in all, and may continue the hearing for want of sufficient notice or other good cause. The court, upon application of the petitioners or any person or persons interested, shall permit the petition to be amended, and may order further or additional notice to be given. Upon such hearing all persons interested, whose lands or rights may be damaged or benefited by the organization of the district or the irrigation works or improvements therein or to be acquired or constructed as hereinafter set forth, may appear and contest the necessity or utility of the proposed district, or any part thereof, and the contestants and petitioners may offer any competent evidence in regard thereto.

(2) It shall be the duty of the court to hear and determine whether the requirements of sections 89-1201, 89-1202 and 89-1203 have been complied with, and for that purpose shall hear all competent and relevant testimony that may be offered.

(3) The court may make such changes in the proposed district as may be deemed advisable, or as fact, right, and justice may require; but shall not exclude from such proposed district any land which is susceptible of irrigation from the same general source, and by the same general system of works applicable to the other lands of such proposed district, if the owner or owners of such lands shall file in such district court a written request that such lands be included in such district; nor shall any lands which will not, in the judgment of the court, be benefited by irrigation by means of said system of works, nor shall lands already under irrigation, nor lands having water rights appurtenant thereto, nor lands than can be irrigated from sources more feasible than the district system, be included within such proposed district, unless the owner of such lands shall consent in writing to the inclusion of such lands in the proposed district, as hereinafter provided, and to this end the court may subdivide lands included within the petition or proposed at the hearing to be included within such district into forty-acre tracts or smaller subdivisions thereof; provided, however, that where a district is formed to co-operate with the United States, lands previously irrigated and having water rights appurtenant thereto may be included within the district boundaries, if it shall appear to the court that the same will be benefited thereby; and provided further,

that all lands having water rights appurtenant thereto, which are served by a system of irrigation works supplying more than ten thousand acres of lands, may, in the discretion of the court, be included in the proposed district on petition of at least a majority both in number and acreage of the holders of title or evidence of title to the land having water rights appurtenant thereto, and served by the same system of irrigation works. Lands of the district need not be contiguous, and any particular tract or tracts, irrespective of their location in the district, may be excluded.

(4) If, on final hearing, it is found by the court that the petition does not substantially comply with the aforesaid requirements of this act, or that the facts therein stated are not sustained by the evidence, then the court shall dismiss the petition at the cost of the petitioners, and shall make and enter an order to that effect; but if it is found that said petition substantially complies with said requirements, and that the facts therein stated are sustained by the evidence, then the court shall make and enter an order:

1. Setting forth said findings and allowing said petition;
2. Establishing the proposed district;
3. Giving accurate descriptions of the lands included within the proposed district;
4. Dividing the proposed district into three, five, or seven divisions, as may be advisable in view of the size of the district;
5. Appointing as commissioner one competent person for each division of the district, having the qualifications as provided by section 89-1205.

(5) Such finding and order shall be conclusive upon all the owners of lands within the district that they have assented to and accepted the provisions of this act; and shall be final unless appealed from to the supreme court within sixty days from the day of entry of such order. A copy of such order, duly certified to by the clerk of said court, shall be filed for record within thirty days after such order is made and entered with the county clerk and recorder of the county wherein the lands included within such district are situated; provided, however, there shall be omitted from such copy lands not situated in the county in which such copy is filed.

(6) Every irrigation district so established hereunder is hereby declared to be a public corporation for the promotion of the public welfare, and the lands included therein shall constitute all the taxable and assessable property of such district for the purposes of this act.

History: En. Sec. 4, Ch. 146, L. 1909; amd. Sec. 2, Ch. 153, L. 1917; amd. Sec. 2, Ch. 116, L. 1919; re-en. Sec. 7169, R. C. M. 1921.

Constitutionality

Rev. Codes Montana, sections 89-1202 et seq., relating to organization of irrigation districts, is not invalid, as depriving non-resident of right of removal of suit to federal court. *Tomich v. Union Trust Co.*, 31 F 2d 515.

Court to Determine Whether Or Not Land Shall Be Included

Whether or not lands then under irriga-

tion should have been included in irrigation district organized under the Revised Codes of Montana, sections 89-1202 et seq., was for determination of court on hearing of petition for organization of district. *Tomich v. Union Trust Co.*, 31 F 2d 515.

Description of Land

Where in an order establishing an irrigation district, the description of the lands included in it were sufficient under this section, the fact that the court went further and made a tabulation under various headings, such as "Gross Area," "Area Included," etc., did not render the order void, such matter having been surplusage

which may properly be disregarded under the statutory maxim that "superfluity does not vitiate." *Walden v. Bitter Root Irr. Dist.*, 68 M 281, 289, 217 P 646.

Effect of Failure to Appeal

The provisions of this section and Sec. 3967, R. C. M. 1921 (since repealed), declaring, in effect, that an appeal from a judgment creating an irrigation district, and from one confirming a bond issue of such a district, shall be the exclusive method of attacking the validity of either, do not bar an action by which it is sought to evade the effect of such judgments on grounds recognized as sufficient to vacate an ordinary judgment—fraud and want of jurisdiction. *Scilley v. Red Lodge-Rosebud Irr. Dist.*, 83 M 282, 289 et seq., 305, 272 P 543.

Finality of Order

An order of court creating an irrigation district is in the nature of a judgment or decree; it stands as an absolute finality as to everything directly or impliedly determined, and cannot be attacked collaterally; unless the judgment roll shows it to be void. *Blaser v. Clinton Irrigation District*, 100 M 459, 464, 53 P 2d 1141.

Inclusion of Irrigated Lands

While under the Irrigation District Act the question whether lands will or will not be benefited by means of an irrigation system in contemplation is left to the discretion of the court, the inclusion of lands already irrigated from appurtenant water rights depends, not upon the exercise of the court's discretion, but upon the written consent of the owner, under this section. *Scilley v. Red Lodge-Rosebud Irr. Dist.*, 83 M 289 et seq., 305, 272 P 543.

Taxation of Property of a Public Corporation

The property of a public corporation may not be declared exempt from taxation, unless it is made exempt by virtue of express pronouncement of the Constitution or legislative declaration permitted by the Constitution. *Buffalo Rapids Irr. Dist. v. Collieran*, 85 M 466, 470, 279 P 369.

Id. Held, that an irrigation district is not a "municipal corporation" within the meaning of section 2, Article XII of the

Constitution, providing that the property of municipal corporations shall be exempt from taxation, and therefore the county in which such a district was located had the power to assess and levy a tax upon lands acquired by the district by tax deed.

What Order to Contain

While the court's order should be clear as to material issues on the hearing of a petition for the creation of irrigation district, particularly on boundaries, lands included, practicability thereof, benefits and damages to included lands, etc. it should leave the details respecting the works to be constructed to the discretion of the district. *Blaser v. Clinton Irrigation District*, 100 M 459, 466, 53 P 2d 1141.

When Objections to Be Made

Objection that land proposed to be included in irrigation district organized under sections 89-1202 to 89-1206, should not be included, must be made by landowner at time district is formed, there being a hearing afforded for that purpose. *Tomich v. Union Trust Co.*, 31 F 2d 515.

References

Cited or applied as section 4, chapter 146, Laws of 1909, before amendment, in *O'Neill v. Yellowstone Irr. Dist.*, 44 M 492, 503, 121 P 283; *In re Crow Creek Irrigation District*, 63 M 293, 298 et seq., 207 P 121; *In re Bitter Root Irr. Dist.*, 67 M 436, 438, 218 P 945; *State v. District Court et al.*, 69 M 415, 421, 222 P 444; *Crow Creek Irr. Dist. v. Crittenden*, 71 M 66, 69, 227 P 63; *Cosman v. Chestnut Valley Irr. Dist.*, 74 M 111, 113, 118, 238 P 879; *State v. McGraw*, 74 M 164, 165, 240 P 817; *State v. Nicholson*, 74 M 346, 350, 240 P 837; *Clark v. Demers*, 78 M 287, 293, 254 P 162; *In re Fort Shaw Irr. Dist.*, 81 M 170, 180, 261 P 962; *Drake v. Schoregge et al.*, 85 M 94, 99 et seq., 104, 277 P 627; *State et al. v. Board of Commissioners et al.*, 89 M 37, 296 P 1; *State ex rel. Blenkner v. Stillwater County*, 104 M 387, 392, 66 P 2d 788; *State ex rel. Swanson v. District Court*, 107 M 203, 211, 82 P 2d 779.

Waters and Water Courses—225, 227.

67 C.J. Waters §§ 865 et seq., 892 et seq.

89-1205. (7170) Qualifications of commissioners and term of office—official bond. No person shall be qualified to hold the position of commissioner unless he be an owner of land within the district and shall be a resident of the county in which the division of the district, or some portion thereof for which such commissioner so elected, is situated.

The commissioners appointed as aforesaid shall hold their respective offices until the second Saturday in April following their appointment,

and until their respective successors are elected and qualified as and in the manner hereinafter provided. Each of such commissioners shall qualify in the same manner as justices of the peace, and shall give a bond in the sum of two thousand dollars, conditioned upon the faithful performance of his duties, to be made payable to the state for the benefit of the district; which bond shall be approved by the district court or judge thereof and filed in the office of the clerk of said court; provided, that in case any district organized under this title is appointed fiscal agent of the United States, or by the United States is authorized to make collections of moneys for and on behalf of the United States in connection with any federal reclamation project, each such commissioner shall execute a further and additional official bond in such sum as the secretary of the interior may require, conditioned for the faithful discharge of the duties of his office, and the faithful discharge by the district of its duties as fiscal or other agent of the United States under any such appointment or authorization, and any such bond may be sued upon by the United States, or any person injured by the failure of such commissioner or the district to fully, promptly, and completely perform their respective duties.

History: En. Sec. 5, Ch. 146, L. 1909; amd. Sec. 1, Ch. 145, L. 1915; re-en. Sec. 7170, R. C. M. 1921.

1929 fixing such bonds at \$2500.00 and \$1000.00 according to the obligations of the district. Opinions of Attorney General Vol. 14, pg. 119.

NOTE.—This section fixing irrigation commissioner's official bond at \$2000.00 held impliedly amended by section 89-1208 (7173) as amended by Ch. 15, L.

References

State ex rel. Swanson v. District Court, 107 M 203, 211, 82 P 2d 779.

89-1206. (7171) Organization of board of commissioners — officers — compensation—office of board to be designated. The commissioners shall meet within ten days after their appointment and shall organize as a board by the election of one of their number as president; they shall also elect a secretary (who may or may not be a commissioner). The compensation of the secretary and all other employees authorized under this act shall be fixed by the board.

The board shall also at this meeting designate the place where the office of the board shall be established and maintained and its records kept, which place shall be in the county containing the major portion of the lands in the district; and such place shall not be changed except by resolution of the board, of which notice shall be given by at least one publication in some newspaper published or of general circulation in the county wherein the office of the district is located, and by posting in at least three public places in each division of the district.

History: En. Sec. 6, Ch. 146, L. 1909; re-en. Sec. 7171, R. C. M. 1921; amd. Sec. 2, Ch. 157, L. 1923.

References

State ex rel. Swanson v. District Court, 107 M 203, 211, 82 P 2d 779.

89-1207. (7172) Meetings of the board. All meetings of the board of commissioners shall be public and a complete record of all proceedings shall be kept by the secretary.

Regular meetings of the board shall be held at such times as the board may by rule or by-law prescribe; and special meetings may be called on twenty-four hours' notice by the president or any two members of the

board, or in such other manner and upon such other notice as the board may by rule or by-law prescribe. All meetings of the board may be adjourned as the board shall order or direct. A majority of the commissioners shall constitute a quorum.

History: En. Sec. 7, Ch. 146, L. 1909; Waters and Water Courses 227, 228. re-en. Sec. 7172, R. C. M. 1921. 67 C.J. Waters §§ 892 et seq., 901 et seq.

References

State ex rel. Swanson v. District Court,
107 M 203, 211, 82 P 2d 779.

89-1208. (7173) Salary of commissioners—penalty for interest in contract—bonds of commissioners. The commissioners, when sitting as a board or when engaged in the business of the district, shall each receive not to exceed five dollars (\$5.00), per day for services, and, in addition thereto, their necessary expenses in attending meetings, or when otherwise engaged on district business, including premiums on qualifying bonds and any other bonds required of them in connection with their office, provided such expenses and per diem be approved by a unanimous vote of said board.

No commissioner or any other officer named in this act shall in any manner be interested directly or indirectly, in any contract awarded or to be awarded by the board, or in the profits derived therefrom; and for any violation of this provision, such officer shall be deemed guilty of a misdemeanor and his conviction thereof shall work forfeiture of his office and he shall be punished by a fine not exceeding five hundred dollars (\$500.00), or by imprisonment in the county jail not exceeding six (6) months or by both such fine and imprisonment.

The commissioners of said irrigation district shall each furnish a bond in the penal sum of twenty-five hundred dollars (\$2500.00), with corporate surety conditioned for the faithful performance of their duties under this act, and the secretary shall furnish bond, with corporate surety, in the sum of one thousand dollars (\$1000.00), conditioned for the faithful performance of his duties pursuant to this act, and for the proper and safe keeping of the records and documents of said district, in all cases where the obligations of said district, either existing or proposed, total two hundred and fifty thousand dollars (\$250,000.00) or over. In all other cases the bond for said commissioners shall be in the sum of one thousand dollars (\$1000.00).

History: En. Sec. 8, Ch. 146, L. 1909; L. 1923; amd. Sec. 1, Ch. 116, L. 1927; amd. Sec. 1, Ch. 120, L. 1921; re-en. Sec. amd. Sec. 1, Ch. 15, L. 1929. 7173, R. C. M. 1921; amd. Sec. 3, Ch. 157, NOTE.—See note to section 89-1205.

CHAPTER 13

IRRIGATION DISTRICTS—BOARD OF COMMISSIONERS, POWERS, DUTIES AND ELECTIONS

- Section 89-1301. Powers and duties of commissioners.
89-1302. Creation of election precincts—change in divisions and election precincts.
89-1303. First election of commissioners—regular election—term of office.
89-1304. Vacancies among commissioners, how filled.
89-1305. Notice of election and appointment of election officers.
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- 89-1308. Conduct of election.
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- 89-1311. Qualification of electors—voting rights, how determined.
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- 89-1316. Petition requirements—obligations to be determined.
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- 89-1318. Creation of districts by owners of water of adjudicated streams—purpose of act.
- 89-1319. Application of act.
- 89-1320. Petition—hearing and notice—order of court—commissioners.
- 89-1321. Meeting—notice—election of trustees.
- 89-1322. Duty of trustees—limit on levy to cover expense—determination of levy—indebtedness other than warrant indebtedness not to be created.
- 89-1323. Basis and apportionment of annual tax.
- 89-1324. Act not to conflict with other regulations.
- 89-1325. Dissolution of district.

89-1301. (7174) Powers and duties of commissioners. The board of commissioners of every irrigation district established and organized under and by virtue of this act shall constitute the corporate authority of said district.

(1) The board shall have the power, and it shall be the duty of the members thereof, to manage and conduct the business and affairs of the district; adopt a corporate seal therefor; make and execute all necessary contracts; employ and appoint such agents, officers, and employees as may be required, and prescribe their duties.

(2) The board and its agents and employees shall have the right to enter upon any land to make surveys, and may locate the necessary irrigation works, including drainage works and the line for any canal or canals, and necessary branches for the same, on any lands which in the judgment of the board may be deemed best suited for such location.

(3) The board shall have power and authority to appropriate water in the name of the district, to acquire by purchase, lease, or contract, water and water rights; additional waters and supplies of water, canals, reservoirs, dams and other works already constructed, or in the course of construction, with the privilege, if desired, to contract with the owner, or owners of such canals, reservoirs, dams and other works so purchased and in the course of construction, for the completion thereof and shall also have power and authority to acquire by purchase, lease, contract, condemnation, or other legal means, lands (and rights in lands) for rights-of-way, for reservoirs, for the storage of needful waters, and for dam sites, and necessary appurtenances, and such other lands and property as may be necessary for the construction, use, maintenance, repair, improvement, enlargement and operation of any district system of irrigation works.

(4) The board shall have power and authority to enter into, and do any acts necessary or proper for the performance of any agreements with any state, county, district of any kind, public or private corporation, association, firm or individual, or any number of them, for the joint acquisition, construction, leasing, ownership, disposition, use, management, maintenance, repair, or operation of any rights, works or other property

of a kind which might lawfully be acquired or owned by the irrigation district, and may acquire the right to store water in any reservoirs or to carry water through any canal, ditch, or conduit not owned or controlled by the district, and may grant to any owner or lessee of the right to the use of any water the right to store such water in any reservoir of the district or to carry such water through any canal, ditch or conduit of the district.

(5) But no purchase, lease or contract for purchase of any water, or water rights, or canals, or reservoirs, or reservoir sites, or dam sites, or irrigation works or other property of any nature or kind or for the making or purchasing of surveys, maps, plans, estimates and specifications, or for the purchase of machinery for pumping plants, or the erection of buildings, aqueducts and other structures necessarily used in connection with such pumping plants, for a price or rental in excess of ten thousand dollars, shall be final or binding upon the district, nor shall said sum be paid without the written consent or petition of at least a majority in number and acreage of the holders of title or evidence of title to the lands within the district. Any splitting or division of such purchase, lease or contract with the purpose or intention of avoiding or circumventing the provisions of this section shall render such divided or split contract or contracts absolutely null and void.

(6) For the purpose of acquiring control over government land within the district and of complying with the provisions of the act of congress of August 11, 1916, the board shall have authority to make such investigations, and base thereon such representations and assurances to the secretary of the interior, as may be requisite.

(7) The board may enter into any obligation or contract with the United States for the construction, operation, and maintenance of the necessary works for the delivery and distribution of water therefrom, and of the necessary drainage works; or for the assumption, as principal or guarantor, of indebtedness to the United States on account of district lands, under the provisions of the federal reclamation act and all acts amendatory thereof or supplementary thereto, and the rules and regulations established thereunder; or the board may contract with the United States for a water supply under any act of congress providing for or permitting such contract, and in case contract has been or may hereafter be made with the United States as herein provided, bonds of the district may be deposited with the United States at ninety per cent. of their par value, to the amount to be paid by the district to the United States under any such contract, the interest on said bonds of the district and regularly paid to the United States to be applied as provided in such contract, and if bonds of the district are not so deposited, it shall be the duty of the board of commissioners to include as part of any levy or assessment provided for in section 89-1801, an amount sufficient to meet each year all payments accruing under the terms of any such contract; and the board may accept, on behalf of the district, appointment of the district as fiscal agent of the United States, or authorization of the district by the United States to make collections of moneys for or on behalf of the United States in connection with any federal reclamation project,

whereupon the district shall be authorized to so act and to assume the duties and liabilities incident to such action, and the said board shall have full power to do any and all things required by the federal statutes now or hereafter enacted in connection therewith, and all things required by the rules and regulations now or that may hereafter be established by any department of the federal government in regard thereto, including the power to require the prompt payment of all charges as prerequisite to water service.

(8) Said board may also construct and maintain the necessary dams, reservoirs, and works for the collection and distribution of water for the district, from one or more sources and from different and additional sources, and operate such works, and may secure in any of the manners in this act provided additional water supplies from the same or different sources, and do any and every lawful act necessary to be done in order that sufficient water may be furnished for irrigation purposes to all the lands in the district included at the time of its organization or at any time thereafter.

(9) The board is hereby authorized and empowered to take conveyances or other assurances for all property acquired by it under the provisions of this act, in the name of the district, to and for the uses and purposes herein expressed.

(10) The board is hereby authorized and empowered to institute and maintain any and all actions and proceedings, suits at law or in equity, necessary or proper in order to fully carry out the provisions of this chapter, or to enforce, maintain, protect, or preserve any and all rights, privileges, and immunities created by this act, or acquired in pursuance thereof, and in all courts, suits, or proceedings, the said board may sue, appear, and defend in person or by attorneys, and in the name of such irrigation district.

(11) The board may adopt rules and by-laws governing the calling and holding of meetings of the board, the manner of transacting business thereat, and the publishing or posting of the orders, resolutions, and proceedings of the board. It shall be the duty of said board to pass or adopt by-laws, rules and regulations for the apportionment and distribution of water to the lands of the district, and for the protection and preservation of the works and other property of the district, which shall be printed in convenient form for distribution in the district; and may therein require the prompt payment of all taxes and assessments delinquent for not to exceed two years as a prerequisite to water service. All orders and resolutions shall be passed or adopted by a majority of the commissioners by a yea and nay vote, to be entered upon the records of the board.

(12) For the purpose of purchasing or constructing the necessary irrigation canals or works, or acquiring the necessary property and rights therefor, and otherwise carrying out the provisions of this act, the board of commissioners of any irrigation district must, as soon after such district has been organized as practicable, formulate a general plan for such purchase, construction, and acquisition of such property, and shall cause such surveys, examinations, and plans to be made as shall demonstrate the practicability of such plans, as well as of procuring water from other

and different sources, the amount of land that can be irrigated thereunder, and furnish the proper basis for an estimate of the cost of carrying out such plan and the value of any canal, works, property, or system of irrigation proposed to be purchased. All such surveys, examinations, maps, plans, and estimates shall be made by or under the direction and supervision of an irrigation engineer of well-known standing and competency, and all such necessary surveys, examinations, maps, plans and estimates must be certified to by him. When all such are completed, he shall submit them with all proper field notes to, and file them with, the board of commissioners, accompanied by his report and recommendation thereon. This report shall include a discussion of said plans by him submitted to said board, of the question of water supply, of the sufficiency of the works proposed to accomplish the desired results, of the practicability of the proposed system from an engineering standpoint, of the probability of being acquired or constructed within the estimate of the cost stated, and such general discussion and recommendation in regard to the engineering and financial features of the whole matter as in the judgment of such engineer shall be desirable for the information of the people of the district. Such report shall be accompanied by a map, when such is necessary for a proper explanation or understanding of the same.

Upon receiving such report, said board of commissioners shall proceed to determine the amount of money necessary to be raised for the purchase or construction of said proposed property, canals, or irrigation works, and system, and within ten days after arriving at such determination shall cause the secretary of said board to notify all persons or corporations holding title or evidence of title to lands within said district (ascertained as provided in section 89-1201) of the filing of said report and their determination thereon. Said notices shall be given through the United States mail by letter addressed to such person or corporation at the last known post-office address of each person or corporation aforesaid. A certificate of the secretary of the board as to the fact of mailing said notice, affixed to a copy of said notice and recorded in the record book of said board of commissioners, shall be sufficient and conclusive evidence of such fact.

(13) Said board shall have power generally to do and perform all such other acts as shall be necessary or appropriate to fully carry out the purposes of this act.

History: En. Sec. 9, Ch. 146, L. 1909; amd. Sec. 2, Ch. 145, L. 1915; amd. Sec. 3, Ch. 153, L. 1917; amd. Sec. 3, Ch. 116, L. 1919; re-en. Sec. 7174, R. C. M. 1921; amd. Sec. 4, Ch. 157, L. 1923.

Operation and Effect

Held, that an irrigation district is not a "subdivision" of the state within the meaning of section 1, Article XIII of the Constitution, providing that neither county, city, town, municipality "nor other subdivision of the state" shall become a shareholder in or a joint owner with a company or corporation, and therefore its board of

commissioners may acquire shares in a reservoir company or purchase rights to the use of water, as authorized by this section. *Thaanum v. Bynum Irrigation District*, 72 M 221, 223 et seq., 232 P 528.

Id. The taxes which an irrigation district is authorized to levy upon the lands included in the district for the purpose of paying for property acquired are in the nature of special assessments as distinguished from general taxes, and by the expenditure of moneys authorized by this section, it obtains an equivalent in the value of the property purchased, hence does not come within the prohibition of section 1, Article XIII, of the Constitution, above.

Waters and Water Courses—227-230.
67 C.J. Waters §§ 892 et seq., 901 et seq.,
911 et seq.

30 Am. Jur. 656, Irrigation, §§ 83 et seq.

89-1302. (7175) Creation of election precincts—change in divisions and election precincts. The board of commissioners shall, within six months after the organization of the district, divide the district into one or more election precincts.

Said board, when they deem it advisable for the best interests of the district and the convenience of the electors thereof, may, at any time, but not less than thirty days before any election to be held in the district, change the boundaries of the divisions and election precincts of the district; provided, that such action of the board, to be effective, shall be approved by the district court; and provided, also, that in making such changes the several divisions of the district shall be kept as nearly equal in area and population as practicable.

Such division into election precincts, and such change of boundaries of the divisions or election precincts, shall be made by resolution or order of the board, to be recorded in the minutes of the board, together with the order of the district court approving the same, and a certified copy of the same shall be filed in the office of the county clerk and recorder in each county in which any of the lands of the district are situated.

History: En. Sec. 10, Ch. 146, L. 1909; Waters and Water Courses—225.
re-en. Sec. 7175, R. C. M. 1921. 67 C.J. Waters § 864 et seq.

89-1303. (7176) First election of commissioners—regular election—term of office. The regular election for commissioners in each district shall be held annually on the first Saturday in April of each year; and on the third Saturday in April following their election the commissioners shall meet and organize as a board by electing a president from their number and a secretary, who may or may not be a commissioner, and who shall each hold office during the pleasure of the board. The term of office of each commissioner shall begin on the third Saturday in April after the regular election and shall continue for three years and until the election and qualification of his successor. Commissioners are elected by the electors of the entire district. At the regular election for commissioners held in April, 1921, there shall be elected one commissioner for the first division of each district who shall hold his office for the term of one year, one commissioner for the second division of each district who shall hold his office for the term of two years, and one commissioner for the third division of each district who shall hold his office for the term of three years; and if there be five divisions in a district one commissioner shall be elected for the fourth division who shall hold his office for two years, and one commissioner shall be elected for the fifth division who shall hold his office for three years; and if there be seven divisions in a district one commissioner shall be elected for the sixth division who shall hold his office for two years, and one commissioner shall be elected for the seventh division who shall hold his office for three years; provided, however, that this act shall not be construed to extend the term of any commissioner heretofore elected or appointed in any district.

History: En. Sec. 11, Ch. 146, L. 1909; 1, Ch. 3, L. 1921; amd. Sec. 1, Ch. 7, Ex. L.
amd. Sec. 4, Ch. 153, L. 1917; amd. Sec. 1921; re-en. Sec. 7176, R. C. M. 1921.

89-1304. (7177) Vacancies among commissioners, how filled. In case of a vacancy in the board of commissioners, from any cause, such vacancy shall be filled for the remainder of the term by appointment by the judge of the district court of the county in which the division or major portion thereof is situated. The appointee shall be an owner of land within the district and shall be a resident of the county in which the division of the district, or some portion thereof for which such commissioner so elected, is situated, and shall hold office until his successor is elected and qualified.

History: En. Sec. 12, Ch. 146, L. 1909;
re-en. Sec. 7177, R. C. M. 1921; amd. Sec.
5, Ch. 157, L. 1923.

89-1305. (7178) Notice of election and appointment of election officers. Fifteen days before any election held under this act, the secretary of the board of commissioners shall post notices in three public places in each election precinct, of the time and places of holding the election, and shall also post a notice of the same in the office of said board. Prior to the time for posting notices, the board, by a resolution or order entered on their records, shall designate the house or place within each precinct where the election shall be held, and shall appoint for each precinct, from the electors thereof, three judges, who shall constitute a board of election for such precinct. Said judges shall appoint one of their number to act as clerk. If the board fail to appoint a board of election, or the members appointed do not attend at the opening of the polls on the morning of election, the electors of the precinct present at that hour may appoint the board, or supply the place of an absent member thereof. The board shall prescribe the forms, and provide for the printing and distribution of the ballots for all elections held under this act.

History: En. Sec. 13, Ch. 146, L. 1909;
re-en. Sec. 7178, R. C. M. 1921.

89-1306. (7179) Oaths of election officers. The judges may administer all oaths required in the progress of an election, and appoint judges and clerks, if, during the progress of election, any judge or clerk shall cease to act. Any member of the board of election may administer and certify oaths required to be administered during the progress of an election. Before opening the polls, each member of the board must take and subscribe an oath faithfully to perform the duties imposed upon him by law. Any elector of the precinct may administer and certify any such oath.

History: En. Sec. 14, Ch. 146, L. 1909;
re-en. Sec. 7179, R. C. M. 1921.

89-1307. (7180) Hours of election. The polls shall be opened at one o'clock P. M., and be kept open until six o'clock P. M., when the same shall be closed.

History: En. Sec. 15, Ch. 146, L. 1909;
re-en. Sec. 7180, R. C. M. 1921; amd. Sec.
1, Ch. 164, L. 1947.

89-1308. (7181) Conduct of election. Voting may commence as soon as the polls are opened and may continue during all the time the polls remain opened, and such election shall be conducted, except as herein otherwise provided, as nearly as practicable in accordance with the provisions of the gen-

eral election laws of this state, except that no registration shall be required. As soon as all the votes are counted, a certificate shall be drawn upon each of the papers containing the poll-list and tallies, or attached thereto, stating the number of votes cast for each candidate or for each proposition, and designating the office or proposition voted for, which number shall be written in figures and in words at full length. Each certificate shall be signed by the clerk and judges. One of said certificates, with the poll-list and tally-paper to which it is attached, shall be retained by one of the judges, and preserved by him at least six months. The ballots shall be strung upon a cord or thread by the judge during the counting thereof, in the order in which they were entered upon the tally-list by the clerk; and said ballots, together with the other of said certificates, with the poll-list and tally-paper to which it is attached, shall be sealed by the judges and clerk, and indorsed, "Election returns of (naming the precinct) precinct," and be directed to the secretary of the board of commissioners of said district, and shall be immediately delivered by the judges, or some other safe and responsible carrier designated by said judges, to said secretary, and the ballots shall be kept by the board of commissioners in the same manner as ballots in other elections.

History: En. Sec. 16, Ch. 146, L. 1909;
re-en. Sec. 7181, R. C. M. 1921.

89-1309. (7182) Canvass. No list, tally-paper, or certificate returned from any election shall be set aside or rejected merely for want of form, if it can be satisfactorily understood. The board of commissioners of the district shall meet on the first Monday after the election to canvass the returns. If, at the time of the meeting, the returns from each precinct in the district in which the polls were opened have been received, the board shall then and there proceed to canvass the returns thereof; but if all the returns have not been received, the canvass shall be postponed from day to day until all the returns have been received. The canvass must be made in public. The board shall declare elected the person receiving the highest number of votes so returned for each office, and also declare the result of the vote on any question submitted.

History: En. Sec. 17, Ch. 146, L. 1909;
re-en. Sec. 7182, R. C. M. 1921.

89-1310. (7183) Statement of result of election. The secretary of the board of commissioners shall, as soon as the result of any election held under the provisions of this chapter is declared, enter in the records of such board, and file with the county clerk of the county in which the office of said district is located, a statement of such results, which statement must show:

1. A copy of the election notice and proof of posting the same;
2. The names of the judges and clerks of said election;
3. The whole number of votes cast in the district, and in each precinct of the district;
4. The names of the persons voted for;
5. The office to fill which each person was voted for;
6. The number of votes given in each precinct for each of such persons;
7. The number of votes given in the district for each of such persons;

8. The names of the persons declared elected;

9. The proposition or propositions submitted, the vote for and against each, and the result of the vote thereon.

The secretary shall immediately make out and deliver to each person elected a certificate of election, signed by him and authenticated with the seal of the district.

History: En. Sec. 18, Ch. 146, L. 1909;
re-en. Sec. 7183, R. C. M. 1921.

89-1311. (7184) Qualification of electors—voting rights, how determined. At all elections held under the provisions of this act, except as herein otherwise expressly provided, the following holders of title, or evidence of title, to lands within the district, herein designated electors, shall be entitled to vote:

1. All persons having the qualifications of electors under the constitution and general and school laws of the state;

2. Guardians, executors, administrators, and trustees residing in the state;

3. Domestic corporations, by their duly organized agents.

In all elections held under this act, each elector shall be permitted to cast one vote for each forty acres of irrigable land, or major fraction thereof, owned by such elector within the district, irrespective of the location of such irrigable lands within the tracts designated by the commissioners for assessment and taxation purposes, or within congressional subdivisions, platted lots or blocks, election precincts or district divisions, but any elector owning any less than forty acres of irrigable land shall be entitled to one vote. Until actual determination of the irrigable area under the plan of reclamation proposed is had, all land included within the boundaries of the district shall be deemed to be irrigable land for election purposes.

Where land is owned by co-owners, said owners may designate one of their number, or an agent, to cast the vote for said owners, and one vote only for each forty acres of irrigable land, or major fraction thereof, shall be cast by said co-owner or agent. Where land is under contract of sale to a purchaser residing within the state, such purchaser may vote on behalf of the owner of said land. When voting, the agent of a corporation, or of co-owners, or the co-owner designated for purpose of voting, or the purchaser of land under contract of sale, as the case may be, shall file with the secretary of the district, or with the election officials, a written instrument of his authority, executed and acknowledged by the proper officers of said corporation, or by said co-owners, or by the owner of such land under contract of sale, as the case may be, and thereupon such agent or co-owner, or purchaser, as the case may be, shall be deemed an elector within the meaning of this act.

History: En. Sec. 19, Ch. 146, L. 1909;
re-en. Sec. 7184, R. C. M. 1921; amd. Sec.
6, Ch. 157, L. 1923.

Operation and Effect

Under this section a domestic corporation is treated as an individual, and a

guardian, executor, administrator, or trustee residing in this state is authorized to act for his ward, estate, or beneficiary, as the case may be, so far as exercising the voting power is concerned. In re Gallatin Irrigation District, 48 M 605, 611, 140 P 92.

89-1312. (7185) Nominations. Candidates for the office of commissioner to be filled by election under the provisions of this act may be nominated by petition filed with the secretary of the board of commissioners of the district at least ten days prior to said election, and signed by not less than five electors of the district; such petition shall specify the respective divisions for which such nominees, respectively, are candidates; and the names of all candidates for each division of the district shall be printed on the same ballot.

If no nominations are made, the electors of the district shall write on the ballots the names of the persons for whom they desire to vote for commissioners; provided, nothing herein contained shall prevent an elector from voting for any qualified person, although the name does not appear upon the official ballots.

History: En. Sec. 20, Ch. 146, L. 1909;
re-en. Sec. 7185, R. C. M. 1921.

89-1313. (7186) Special elections. The board of commissioners may at any time call a special election, and submit to the qualified electors of the district any question which under the provisions of this act is required, or which, in the judgment of the board, is proper to be submitted to popular vote. Such election shall be called, noticed, and conducted, and the result thereof determined and declared, in the manner provided in this act relative to general district elections; provided, however, that the notice thereof shall, in addition to being posted, also be published at least once, not less than ten days prior to the date of the election, in some newspaper published in the county in which the office of the board of commissioners of the district is located.

History: En. Sec. 21, Ch. 146, L. 1909;
re-en. Sec. 7186, R. C. M. 1921.


89-1314. (7187) Where documents to be filed and proceedings had. Where the lands of a district lie within more than one county, all petitions, papers, documents, or other instruments shall be filed, and proceedings had, in the county containing the greater portion of said district.

History: En. Sec. 22, Ch. 146, L. 1909; Waters and Water Courses §228.
re-en. Sec. 7187, R. C. M. 1921. 67 C.J. Waters §901 et seq.

89-1315. (7187.1) Withdrawal of lands from existing district to organize separate or consolidated district in cooperation with federal projects. That whenever the holders of title or evidence of title to a part of the lands of an irrigation district organized and existing under the provisions of section 89-1201, which said lands lie within and are served by an irrigation and/or drainage project constructed, operated and maintained by the United States, desire a separation of said lands from said irrigation district for the purpose of forming a new district or combining with another existing district in order to cooperate with the United States as in said section 89-1201, provided, said separation, organization of a new district or combination with another existing district may be effected by petitioning the district court of the county in which the lands of the district, or the greater portion thereof, are situated, for an order or decree changing the boundaries of the district by the elimination therefrom of such lands and their incorpo-

ration in another existing district or in a new and separate district; provided that such changes shall not otherwise impair or affect the organization of the district now including said lands or its rights in or to property, or any of its rights or privileges of whatsoever kind or nature, nor shall it affect, impair, or discharge any contract, obligation, lien, or charge for or upon which it was or might become liable or chargeable had such changes not been made.

History: En. Sec. 1, Ch. 98, L. 1933.

Waters and Water Courses  226.
67 C.J. Waters § 878 et seq.

89-1316. (7187.2) Petition requirements—obligations to be determined.

The petition for this purpose must be signed by at least seventy-five per cent. (75%), both in number and in acreage, of the holders of title or evidence of title (evidence as provided in section 89-1201) of the lands proposed to be eliminated from one district and incorporated in another existing district or in a new and separate district; provided, that such petition must also bear the signature of the secretary of the interior of the United States, approving such proposed changes in district organization; and provided further, that construction costs and other obligations due or to become due to the United States on account of the lands so separated and the participation of the owners thereof in contracts in effect between the original district and the United States, or between the district to be extended by the addition of said lands and the United States, shall be fixed and determined by said secretary of the interior.

History: En. Sec. 2, Ch. 98, L. 1933.


89-1317. (7187.3) Proceedings subsequent to presenting petition.

When said petition is duly presented to the district court, all further proceedings with reference to lands, the owners of which seek to form a new and separate district, shall be prescribed in sections 89-1201 and 89-1208 and all further proceedings with reference to lands, the owners of which desire that they be incorporated in another existing district, shall be as prescribed in the last four (4) paragraphs of section 89-1402, insofar as said provisions are not inconsistent with the purposes of this act.

History: En. Sec. 3, Ch. 98, L. 1933.

89-1318. (7187.4) Creation of districts by owners of water of adjudicated streams—purpose of act. It is the purpose and intention of this act in the furtherance of public welfare to provide an effective public agency for the improvement, development and maintenance of certain existing irrigation systems in cases where administration thereof, through the agency of a water commissioner and the present existing statutes, is not effective.

History: En. Sec. 1, Ch. 117, L. 1933.

Waters and Water Courses  224.
67 C.J. Waters § 862 et seq.

89-1319. (7187.5) Application of act. This act shall apply only when twenty or more owners of land with water rights appurtenant thereto, serving at least two thousand acres of land contiguous in location or of reasonably compact area, all being served by one stream and its branches or from one source of water supply, and in which the rights to the use of water shall have been determined by decree of a court of competent jurisdiction.

History: En. Sec. 2, Ch. 117, L. 1933.

Waters and Water Courses—224, 226,
67 C.J. Waters §§ 862 et seq., 878 et seq.

89-1320. (7187.6) Petition—hearing and notice—order of court—commissioners. Whenever the owners of land and water rights, as described in section 89-1319, desire to organize for the purposes mentioned in this act, a petition to that effect, signed by not less than sixty per cent. of the individual landowners who shall represent not less than fifty-one per cent. of the irrigable acres to be affected by such district and fifty-one per cent. of the inches of water decreed or adjudicated in the stream in which such irrigation district is to operate, shall be filed with the clerk of the district court of the county or counties in which such district is to be created. It is provided, however, that for the purposes of determining whether the requirement of acreage and water inches has been met by the petition, water diverted from the adjudicated stream and distributed under other irrigation districts than the one to be created under this act, shall not be considered; however, such water and acreage shall be required to pay any and all assessments the same as other water and acreage affected by irrigation districts created under this act. Upon filing of said petition, the court shall set a date for a hearing on the petition, and a written notice not less than five days prior to such hearing shall be mailed to each landowner or water right owner affected by the proposed district. If the court finds, from such hearing, that an irrigation district, as prayed for in the petition, is feasible and practical, the court shall issue an order creating such irrigation district, which shall constitute the authority for the district to function for the purposes and intent as outlined in this act. The court shall appoint five commissioners who shall be landowners or water right owners, affected by such district, to act until the first annual meeting, as provided hereafter.

History: En. Sec. 3, Ch. 117, L. 1933.

89-1321. (7187.7) Meeting—notice—election of trustees. On the first Monday in March of each year after the creation of the district, a meeting of the water right owners of such district shall be called, time and place for such meeting to be published in at least two issues of the local paper prior to such meeting, and at such meeting a board of trustees of five members to serve for one year shall be elected by ballot.

History: En. Sec. 4, Ch. 117, L. 1933.

Waters and Water Courses—225, 227.
67 C.J. Waters §§ 864 et seq., 892 et seq.

89-1322. (7187.8) Duty of trustees—limit on levy to cover expense—termination of levy—indebtedness other than warrant indebtedness not to be created. The board of trustees shall be authorized to develop the source of supply, to clean, improve and develop the channel of the stream, and to do and perform other work on the main distributing system as will be beneficial to the better distribution of the waters of such decreed water right stream, but in no case shall the board, to cover the expenses of such work, levy to exceed twenty-five cents per acre in any one year. It is further provided, that when waters of the stream under the irrigation district, created by this act, are commingled with other waters or it is difficult to determine just how many acres are irrigable by the water rights held in such stream,

the acre basis of levy shall be determined by the number of inches owned by such party or parties at the rate of one inch of water, statutory measurement, to the acre. It is further provided, that the board shall have no authority to issue bonds or to incur any indebtedness other than warrant indebtedness under the limitations proposed by law.

History: En. Sec. 5, Ch. 117, L. 1933. 30 Am. Jur. 661, Irrigation, §§ 91 et seq.

89-1323. (7187.9) Basis and apportionment of annual tax. The annual tax levy and the apportionment and distribution of the total amount required to be raised in any year shall be had and done in accordance with the provisions and limitations of law applicable to irrigation districts organized under the provisions of sections 89-1201 to 89-2110.

History: En. Sec. 6, Ch. 117, L. 1933. Waters and Water Courses—231.
67 C.J. Waters § 925 et seq.

89-1324. (7187.10) Act not to conflict with other regulations. This act is not intended to conflict in any way with present statutes governing the appointment and duties of water commissioners on adjudicated water right streams or the operation of statutes as to the jurisdiction of courts over such commissioners and water rights and distribution of water under court decree, but is for the sole purpose of making it possible for users of water out of decreed water right streams to improve the stream channel and conserve water in the best possible manner through the agency of an irrigation district, as provided for in this act.

History: En. Sec. 7, Ch. 117, L. 1933.

89-1325. (7187.11) Dissolution of district. A district created under this act may be dissolved by court order upon proper hearing and in the same manner as this act provides for its creation.

History: En. Sec. 8, Ch. 117, L. 1933. Waters and Water Courses—223-225.
67 C.J. Waters § 993 et seq.

CHAPTER 14

IRRIGATION DISTRICTS—EXTENSION—CHANGE IN BOUNDARIES OF AREA—COURT PROCEDURE

- Section 89-1401. Change in boundaries of districts—not to affect organization or rights—elimination of lands from district—proceedings.
89-1402. Changes in area of districts—proceedings.
89-1403. Procedure to correct errors and omissions in orders or decrees.
89-1404. Fixing of taxable acreage—bonds not to be affected by.
89-1405. Petition for fixing of taxable area—contents.
89-1406. Summons—publication—determination of court.
89-1407. Decree fixing amount of irrigable acreage.
89-1408. Appeal to supreme court.
89-1409. Change of boundaries of irrigation districts indebted to United States.
89-1410. Exclusion of lands—petitions—requirements and contents—map—bond for payment of costs.
89-1411. Hearing and notice—publication.
89-1412. Conduct of hearing.
89-1413. Petition may be granted in whole or in part—effect of court's order.
89-1414. Appeal—copy of order to be filed with county clerk.
89-1415. Supplementary nature of act.
89-1416. "Owners" defined—singular includes plural—masculine includes feminine.

89-1401. (7188) Change in boundaries of districts—not to affect organization or rights—elimination of lands from district—proceedings. The

boundaries of any irrigation district organized hereunder may be changed in the manner herein prescribed; provided, such change of the boundaries of the district shall not impair or affect its organization or its rights in or to property, or any of its rights or privileges of whatsoever kind or nature, nor shall it affect, impair, or discharge any contract, obligation, lien, or charge for or upon which it was or might become liable or chargeable had such change of its boundaries not been made.

Whenever lands have been included within the boundaries of an established and organized irrigation district, which from their location or conformation cannot be successfully irrigated by the irrigation works or system already constructed or proposed to be constructed, or the cost of irrigating the same will become burdensome upon the landowners of the district, a majority in number of the holders of title or evidence of title to the land included in such district, such holders of title or evidence of title also representing a majority in acreage of said lands, may petition the district court of the county in which the lands of the district, or the greater portion thereof, are situated, for an order or decree changing the boundaries of the district by the elimination therefrom of such lands. The petition for this purpose must be signed by the required number of holders of title or evidence of title to lands within such district, as hereinbefore specified, and the same shall be filed with the clerk of the district court as herein designated. Such petition shall set forth:

1. The name of the district;
2. A general description of the lands to be eliminated or excluded from the district;
3. The names of the holders of title or evidence of title to the lands sought to be excluded; also the names of the holders of title or evidence of title to the remainder of the lands of said district, ascertained in the manner mentioned in section 89-1201; and if any holder of title is a non-resident of the county or counties in which the district lies, the postoffice address of such non-resident owners, if known;
4. A brief description of the character of the works, water-rights, canals, and other property acquired or proposed to be acquired or constructed for irrigation purposes in the district;
5. A brief statement of the reasons why the lands sought to be excluded should be eliminated from the district;
6. A prayer for the exclusion of the lands sought to be eliminated therefrom.

The petition shall be accompanied by (1) a map or plat of the district, showing thereon the lands sought to be eliminated therefrom, and (2) a good and sufficient bond or undertaking, to be approved by the district court or judge thereof of the county in which the petition is required to be filed under the provisions hereof, to pay all costs in and about the proceedings and the hearing thereof in the event that said petition is denied.

Mere error or omission in the description of any lands, or in the names of any of the holders of title or evidence of title to lands, shall not operate to render invalid any proceedings hereunder, or to deprive the district court of jurisdiction of the subject-matter.

On such petition being filed, the district court or judge thereof shall make an order fixing the time and place of hearing on the petition, and directing that notice thereof be given. Thereupon the clerk of said court shall cause to be published at least once a week for two successive calendar weeks, in some newspaper published in the county where the said petition is filed, a notice stating the time and place by the said district court fixed when and where the hearing on said petition will be had, and containing a brief statement of the matters set forth in said petition and the object thereof; if any portion of the lands sought to be excluded from the district lie within any other county or counties, then said notice shall be published as above provided in a newspaper published in each such other county.

The first publication of said notice shall be not less than thirty days prior to the time mentioned in said notice for said hearing.

If any holder of title or evidence of title to lands sought to be excluded from the district is a non-resident of the county or counties in which the district lies, the clerk of said court shall, within three days after the first publication aforesaid, mail a copy of said notice to each such nonresident whose postoffice address is stated in said petition. The certificate of the clerk of the district court, under the seal of the court, as to the facts of the publishing and mailing of said notice affixed to a copy thereof, shall be sufficient evidence of such facts.

At the time specified in the notice, the district court in which the petition is filed shall hear the petition, but may adjourn such meeting from time to time, not exceeding two weeks in all, and may continue the hearing for the want of sufficient notice or other good cause. The court upon application of the petitioners shall permit the petition to be amended, and may order further or additional notice to be given. Upon such hearing, all persons interested whose lands or rights may be damaged or benefited by the granting of the petition or the exclusion of the lands from the district may appear and contest the necessity or justice of the court's making an order granting such petition in whole or in part, and the contestants and petitioners may offer any competent evidence in regard thereto.

It shall be the duty of the court to hear and determine whether the requirements as herein set forth have been complied with, and for that purpose shall hear all competent and relevant testimony that may be offered.

The court may grant such petition in whole or in part, and may make an order making such changes in the boundaries of the district by the exclusion of such lands therefrom, as may be deemed advisable, or as fact, right, and justice may require.

Such order shall be conclusive upon all of the owners of lands within the district, and shall be final unless appealed from to the supreme court within sixty days of the entry of said order. For the purposes of any such appeal, such order shall be regarded as a final judgment of said district court. A copy of such order, duly certified to by the clerk of said court, shall be filed for record within thirty days after such order is made and entered with the county clerk and recorder of the county wherein lands included within such district are situated; provided, however, there shall be omitted from such copy lands not situated in the county in which such copy is filed.

History: En. Sec. 23, Ch. 146, L. 1909; amd. Sec. 1, Ch. 98, L. 1919; re-en. Sec. 7188, R. C. M. 1921.

References

Drake v. Schoregge et al., 85 M 94, 101, 277 P 267.

Waters and Water Courses—226.

67 C.J. Waters § 878 et seq.

Right of political division to challenge acts or proceedings by which its boundaries or limits are affected. 86 ALR 1367.

89-1402. (7189) Changes in area of districts—proceedings. (1) The boundaries of any irrigation district may be extended at any time to include lands susceptible of irrigation by the works of the district or through exchange or substitution of water, as hereinafter provided, excluding and excepting therefrom, however, all lands already under irrigation, or lands having water-rights appurtenant thereto, or lands that can be irrigated from sources more feasible than the district system, unless the owner of such lands shall consent in writing to have such lands included in said district; provided, however, that a petition be presented to the district court of the judicial district in which the irrigation district was organized, asking for such extension, upon terms to be fixed by the court, signed by the holders of title, or evidence of title (evidenced as in section 89-1201 provided), of the lands proposed to be included in the district, representing not less than two-thirds in acreage of said lands.

(2) When such petition is presented, the district court, or judge thereof, shall appoint a day for a public hearing, notice of which shall be given by the clerk of the court by publication at least once a week for at least two weeks in a newspaper published or of general circulation in the county in which the office of the district is situated; and if any of said lands sought to be included in the district lie in a county or counties other than that in which the office of the district is situated, such notice shall also be likewise published in some newspaper published or of general circulation in each such other county or counties; or, if there be no such newspaper, then such notice shall be posted in at least three public places in the territory sought to be included.

(3) At such public hearing, the district court shall hear those who may desire changes made in the proposed extension, and all those whose lands are included or sought to be included in the district, and all other persons whose rights may be affected by the proposed extension. Such public hearing may be adjourned from day to day, not exceeding twenty days in all, and the court shall make an order either granting or denying said petition; and if said petition is granted, said order shall describe the lands included in said extension and the terms on which said land shall be included, and a copy of said order shall be filed with the county clerk and recorder in the county wherein said lands are situated. The order of the district court shall be final and conclusive, the same as the order originally creating the district, unless appealed from to the supreme court within ten days from the entry of the order; provided, however, that the extension of such boundaries shall not deprive the lands already in said district of an adequate supply of water for irrigation purposes.

History: En. Sec. 24, Ch. 146, L. 1909; amd. Sec. 3, Ch. 145, L. 1915; re-en. Sec. 7189, R. C. M. 1921.

Constitutionality

Held, that this section, prescribing the procedure for the extension of an irriga-

tion district already created, when the Act is viewed as a whole and liberally construed as provided in section 89-2109, is not open to the objection that it operates to deny the non-consenting land owner of his property without due process of law, in that, while providing for a hearing, it makes no provision for granting relief to him. In *re* Crow Creek Irrigation District, 63 M 293, 299, 207 P 121.

Pleadings

In a special proceeding for the extension of an irrigation district, the petition, the jurisdictional notices with proof of service, the objections filed by protestants and the final judgment perform the same office as the complaint, summons, answer and judgment in an ordinary civil action. In

re Bitter Root Irr. Dist., 67 M 436, 218 P 945.

Record on Appeal

A proceeding under section 89-1201 et seq., for the extension of an irrigation district is neither an equity case nor a proceeding of an equitable nature, and therefore the testimony need not be presented in the transcript by question and answer, otherwise made necessary by subdivision 3 of Rule VII of the supreme court. In *re* Bitter Root Irr. Dist., 67 M 436, 218 P 945.

References

In *re* Fort Shaw Irr. Dist., 81 M 170, 181, 261 P 962.

89-1403. (7189.1) Procedure to correct errors and omissions in orders or decrees. The district court shall retain jurisdiction of any petition presented to establish an irrigation district or to enlarge and increase its boundaries, or to exclude land therefrom, for the purpose of correcting any omissions, defects or errors in the proceedings of said court, and shall have power to correct, and if necessary to amend the order of the district court establishing the district or any order extending the boundaries thereof, or any order excluding lands therefrom, including the description of lands included or intended to be included in the district, or excluded therefrom or intended to be excluded, the boundaries of the divisions into which it is divided, and any other matter which shall be before the court on the application to create the district, or to enlarge or extend its boundaries, or to exclude lands therefrom, and shall have and is hereby granted power and authority on application of the board of commissioners of the district, to correct and amend the terms of any order or judgment of said court so that the same shall conform to the provisions of the statute under the authority of which such order was made. The board of commissioners of any district may adopt a resolution directing its president and secretary to prepare, execute and file with the clerk of the district court a petition which shall set forth the following matters:

- (1) The name of the district and a reference to the order in which the defect, error or omission, errors in description of lands included or excluded, or departure from the statute occurred;
- (2) A statement of the defects, errors, omissions, irregularities, errors in description of lands included or excluded, or variance from the statutory requirements;
- (3) A prayer for an order correcting said defects, errors, omissions or irregularities.

If the error, defect, omission, irregularity or variance is in the description of any land or lands embraced in the district, the petition shall set forth the correct description of said lands, the names of the holders of title, or evidence of title thereto, ascertained in the manner provided in section 89-1201; and if any holder is a nonresident of the county or counties in which the district lies, the post office address of such nonresident owner if

known. Upon the filing of said petition, the court shall direct notice of the hearing thereof to be given in such manner as shall be deemed necessary to protect the rights and interests of the parties, and after a hearing of any parties intervening, shall enter an order correcting the said defects, errors, omissions, or irregularities; provided, however, that if the defects, errors, omissions or irregularities are in the description of the lands embraced in the district, the district court or judge shall direct the clerk of said court to publish, at least once a week for two successive calendar weeks, in some newspaper published in said county where said petition is filed, a copy of said petition, together with a notice stating the time and place by said district court fixed, when and where a hearing on said petition will be had, and, if any portion of the lands within said district lies within any other county or counties said petition and notice shall be published as above provided in a newspaper published in each such other county. If there be no newspaper published in such county, such petition and notice may be published in an adjoining county. The first publication of said petition and notice shall be not less than thirty days prior to the time mentioned in said notice for said hearing. If any holder of title or evidence of title to lands within the district is a nonresident of the county or counties in which the district lies, the clerk of said court shall, within three days after the first publication aforesaid, mail a copy of said petition and notice to each such nonresident, whose post office address is stated in said petition. The certificate of the clerk of the district court, under the seal of the court, as to the facts of the publishing and mailing of said petition and notice, affixed to a copy of said notice, shall be sufficient evidence of such facts.

At the time specified in the notice the district court, in which the petition aforesaid is filed, shall hear the petition but may adjourn such hearing from time to time, and may continue the hearing for want of sufficient notice or other good cause. The court, upon application of the petitioners or any person or persons interested, shall permit the petition to be amended and may order further or additional notice to be given. Upon such hearing, all persons interested may appear and contest the application for the order prayed for in the petition, and the contestants and petitioners may offer any competent evidence pertinent to the prayer of the petition.

The court may make such changes in the description of the lands embraced within the limits of the district, as may be deemed advisable, or as fact, right and justice may require, but shall not exclude from the district any lands described as a part of said district in the order creating it, after the district has issued bonds or entered into a contract with the United States under section 89-1301; (provided, however, that such lands may be excluded from a district which has entered into a contract with the United States under said section, provided the secretary of the interior shall give his consent to such exclusion).

If, on final hearing, it is found by the court that the petition does not substantially comply with the foregoing requirements of this section, or that the facts therein stated are not sustained by the evidence, then the court shall dismiss the petition at the cost of the petitioners, and shall make and enter an order to that effect, but if it is found that said petition substantially complies with said requirements, and that the facts therein stated

are sustained by the evidence, the court shall make and enter an order in accordance with the prayers of the petition.

All orders and findings of the district court, made under the provisions of this section, shall be conclusive upon all owners of lands within the district, and shall be final unless appealed from to the supreme court within sixty days from the date of entry of such order. A copy of such order, duly certified to by the clerk of said court, shall be filed for record within thirty days after such order is made and entered with the county clerk and recorder of the county wherein the lands included within such district are situated; provided, however, that there shall be omitted from such copy lands not situated in the county in which such copy is filed.

History: En. Sec. 1, Ch. 54, L. 1923; Waters and Water Courses 226.
amd. Sec. 1, Ch. 13, L. 1937. 67 C.J. Waters § 862 et seq.

89-1404. (7190) Fixing of taxable acreage—bonds not to be affected by. Whenever any lot, tract, or parcel of land has been heretofore, or may hereafter be, included within the boundaries of any public irrigation district formed under the laws of this state, and the acreage thereof fixed and stated in the decree for the creation of said district, or in any other proceeding relating thereto, is fixed at a greater number of acres than actually exist within such lot, tract, or parcel of land, or at a greater number of acres than can be irrigated from the reclamation system of said district; or whenever, from any action or proceeding by or on behalf of said district or its commissioners, any such lot, tract, or parcel of land included therein has been or is about to be assessed from a greater acreage than exists therein, or can be irrigated from the reclamation system of said district, the owner or holder of title or evidence of title to said lands, as defined by the irrigation district acts, may have the taxable acreage contained therein fixed and adjudicated as provided for by this act; provided, however, that if any bonds have been issued with the approval, and pursuant to confirmation by the court, then no proceeding for the determination of the acreage shall be allowed to alter or reduce in any manner the acreage subject to the lien of such bonds, in principal or interest, or of the taxes or assessments to meet the interest or principal thereof, while such bonds or the interest thereon are unpaid in whole or in part; but such proceeding may still be allowed to correct or determine acreage subject to taxes or assessments for maintenance and current expenses, and in so far as the latter only are to be affected.

History: En. Sec. 24, Ch. 146, L. 1909; Waters and Water Courses 225 et seq.
amd. Sec. 3, Ch. 145, L. 1915; re-en. Sec. 67 C.J. Waters § 864 et seq.
7190, R. C. M. 1921; amd. Sec. 3, Ch. 54, Taxation generally. 30 Am. Jur. 661,
L. 1923. Irrigation, §§ 91 et seq.

References

Walden v. Bitter Root Irr. Dist., 68 M
281, 290, 217 P 646.

89-1405. (7191) Petition for fixing of taxable area—contents. The owner or holder of title or evidence of title, as defined by the irrigation district acts, may file in the district court of the county wherein said lands are situated a petition praying that the acreage of the lands set forth and described in such petition may be permanently fixed and adjudicated, which petition shall set forth:

1. The name or names of the owner or owners, holder of title or evidence of title thereto, who shall be the party or parties plaintiff therein;

2. The names and kind and character of interest of every person owning, holding, or claiming any right, title, or interest in or to the lands described in said petition, who shall, where they do not appear as parties plaintiff under subdivision 1 hereof, sit as parties defendant;

3. The name of the district in which said lands are included, together with the name of the board of commissioners thereof, and the secretary thereof, and said district, its commissioners and secretary, shall be made parties defendant therein;

4. A statement of the substance of all proceedings, orders, and decrees creating said districts and fixing the acreage of the lands therein described, together with any proceedings of the board of commissioners of said district or its officers relating to the acreage thereof, to such extent as to fully inform the court of the manner and extent to which said lands have been included and taxed or assessed in said district;

5. The actual acreage of the lands described as irrigable from the reclamation system of said district;

6. The excess of acreage complained of;

7. The amount of taxes previously paid on such excess acreage;

8. A general statement of the exact nature of the relief sought, and the grounds therefor.

History: En. Sec. 24, Ch. 146, L. 1909; 7191, R. C. M. 1921; amd. Sec. 3, Ch. 54, amd. Sec. 3, Ch. 145, L. 1915; re-en. Sec. L. 1923.

89-1406. (7192) Summons—publication—determination of court. Upon the filing of such petition, summons shall be issued thereon and served upon all parties defendant thereto, with a copy of the petition attached thereto, in the same manner and in the same form as issued in civil actions.

Whenever any necessary party thereto cannot, after due diligence, be found within the state of Montana, service upon such party or parties may be had by publication of a summons, which shall be obtained, issued and published in the same manner as a published summons in a civil action.

The provisions of Title 93, and the rules of pleading and practice applicable to civil actions generally, shall apply, so far as applicable, to this proceeding.

If the allegations to such petition be denied, the district court shall, when the time for appearance of the parties defendant thereto has expired, and said parties have appeared by answer or made default, proceed to hear and determine the issues in said proceedings as joined.

History: En. Sec. 24, Ch. 146, L. 1909; amd. Sec. 3, Ch. 145, 1915; re-en. Sec. 7192, R. C. M. 1921; amd. Sec. 3, Ch. 54, L. 1923.

89-1407. (7193) Decree fixing amount of irrigable acreage. Upon the hearing of said petition, the court shall, by its decree, fix and determine the irrigable acreage contained in the lots, tracts, or parcels of land complained of, and the acreage so fixed by such decree shall be the acreage upon which all assessments of said lands in said irrigation district shall thereafter be based, and upon said hearing the court shall determine the amount of taxes, if any, which have theretofore been levied and assessed

upon any excess or non-existent acreage, and shall enter judgment in favor of the owner or holder thereof and against said district for the excess of taxes theretofore collected by said district, or shall cancel such excess if the same shall not have been collected for the benefit of said district; provided, however, that no judgment for the recovery of excess taxes paid shall be entered against any district until there shall have been deducted therefrom any unpaid valid taxes and assessments levied and assessed for the benefit of said district against the lands described in said petition, and all sums so recovered shall bear interest at the rate of eight per cent. per annum from the date of payment by the landholder, and said judgment shall bear legal interest from the date of entry; and the judgment so rendered may be paid by warrants or funds of said future taxation upon said lands, and costs shall be allowed to the plaintiff in the same manner as other civil actions.

History: En. Sec. 24, Ch. 146, L. 1909; amd. Sec. 4, Ch. 145, L. 1915; re-en. Sec. 7193, R. C. M. 1921.

89-1408. (7194) Appeal to supreme court. From any such judgment or decree an appeal may be taken to the supreme court by any party thereto, at any time within ten days of the entry of said judgment or decree. Such appeal shall be taken, perfected, and heard in the manner prescribed by Title 93 governing appeals from the district court to the supreme court. If no such appeal be taken within the time aforesaid, or if taken, the judgment or decree of the district court shall be affirmed by the supreme court, such judgment or decree shall be forever conclusive upon the parties thereto; provided, that in case contract has been made between the district and the United States, as in section 89-1301 provided, no change shall be made in the boundaries of the district, and the district court shall make no order changing the boundaries of the district until the secretary of the interior shall assent thereto in writing, and such assent be filed with the district court.

History: En. Sec. 24, Ch. 146, L. 1909; amd. Sec. 4, Ch. 145, L. 1915; re-en. Sec. 7194, R. C. M. 1921.

Operation and Effect

An exception to the general rule that an appeal does not lie from a part of the judgment is that class of cases where an issue distinct, entire and complete is formed between some of the parties to an action and upon which issue a final judgment is given affecting only the interests and rights of the parties to that issue. In *re Bitter Root Irr. Dist.*, 67 M 436, 218 P 945.

Id. Under the above rules, held in a proceeding, special in its nature, for the extension of an irrigation district, in which an objecting land owner appeared and protested against the inclusion of his lands in

the proposed extension and its exclusion was ordered, that the appeal of petitioners from the order of exclusion was not subject to dismissal as from a portion of the judgment only, the issue between the protestant and the petitioners having been from the whole judgment so far as protestant and petitioners were concerned.

Where plaintiff had not appealed from an order establishing an irrigation district, his action to enjoin a sale of its bonds on the ground that the order was void for failure to give accurate descriptions of the lands included in it was in the nature of a collateral attack maintainable only if the invalidity of the order on that ground appeared from its face. *Walden v. Bitter Root Irr. Dist.*, 68 M 281, 290, 217 P 646.

89-1409. (7194.1) Change of boundaries of irrigation districts indebted to United States. The boundaries of any irrigation district, established and

organized under the laws of the state of Montana and which district is indebted to the United States for money loaned said district, may be changed in the manner hereinafter prescribed; provided such change in boundaries of said district shall not impair or affect its organization or its rights in or to property or any of its rights or privileges of whatsoever kind or nature.

History: En. Sec. 1, Ch. 132, L. 1935.

89-1410. (7194.2) Exclusion of lands—petitions—requirements and contents—map—bond for payment of costs. Whenever lands have been included within the boundaries of any irrigation district of the character designated in section 89-1409 which from their location or confirmation cannot be successfully irrigated by the irrigation works or system constructed for that purpose, or when the cost of irrigating the same has or will become burdensome upon the land owners of the district, the owners of said lands with the consent of the board of commissioners of said district and the secretary of interior of the United States or such other federal authority, instrumentality or agency as may be appropriate may petition the district court of the county in which such lands are situated, for an order or decree changing the boundaries of the district by the elimination therefrom of such lands. The petition for this purpose must be signed by the owners of the land sought to be excluded and accompanied with the written consent of the board of commissioners of the district and the secretary of the interior of the United States or such other federal authority, instrumentality or agency as may be appropriate. Such petition shall set forth:

- A. The name of the district.
- B. A particular description of the land sought to be excluded or eliminated from the district.
- C. The names of the holders of title to the lands sought to be excluded.
- D. A brief description of the character of works, water rights, canals or works owned and acquired by the district.
- E. A statement of the reasons why the lands sought to be excluded should be eliminated from the district.
- F. A prayer for the exclusion of the lands sought to be eliminated therefrom.

The petition shall be accompanied with (1) a map or plat of the district, showing thereon the lands sought to be eliminated therefrom, and (2) a good and sufficient bond or undertaking to be approved by the district court or judge thereof of the county in which the petition is required to be filed under the provisions hereof, to pay all costs in and about the proceedings and hearing thereof in the event that said petition is denied.

History: En. Sec. 2, Ch. 132, L. 1935.

89-1411. (7194.3) Hearing and notice—publication. On such petition being filed the district court or judge thereof shall make an order fixing the time and place of hearing same and directing that notice thereof be given. Thereupon the clerk of said court shall cause to be published at least once a week for two successive calendar weeks, in the official newspaper of the county where said petition is filed, a notice stating the time and place by the district court fixed when and where the hearing on said petition will be had and containing a brief statement of the matters set forth in said

petition and the object thereof; if any portion of the lands sought to be excluded from the district lie within any other county or counties then said notice shall also be published as above provided in the official newspaper of such other county or counties. The first publication of said notice shall be not less than thirty days prior to the time mentioned in said notice for said hearing.

History: En. Sec. 3, Ch. 132, L. 1935.

89-1412. (7194.4) Conduct of hearing. At the time specified in the notice, the district court in which the petition is filed shall hear the petition, but may adjourn such hearing from time to time not exceeding two (2) weeks in all. The court upon application of the petitioners shall permit the petition to be amended, and may order further or additional notice to be given. Upon such hearing, all persons interested whose lands or rights may be damaged or benefited by the granting of the petition or the exclusion of the lands from the district may appear and contest the same, and the contestants and petitioners may offer any competent evidence in regard thereto.

History: En. Sec. 4, Ch. 132, L. 1935.

89-1413. (7194.5) Petition may be granted in whole or in part—effect of court's order. The court may grant such petition in whole or in part, and may make an order making such changes in the boundaries of the district by the exclusion of such lands therefrom as the court may deem advisable, or as fact, right and justice may require. Upon making such order excluding any lands from the district the lands so excluded shall not be liable for further assessments by the district authorities for any purpose and shall be without right to claim any interest in the water rights, canals or other property of the district.

History: En. Sec. 5, Ch. 132, L. 1935.

89-1414. (7194.6) Appeal—copy of order to be filed with county clerk. Such order shall be conclusive upon all owners of lands within the district and shall be final unless appealed from to the supreme court within sixty (60) days from the entry of said order. For the purpose of such appeal, such order shall be regarded as a final judgment of said district court. A copy of said order duly certified by the clerk of court shall be filed for record within thirty (30) days after such order is made and entered with the county clerk and recorder of the county wherein lands included within such district are situated.

History: En. Sec. 6, Ch. 132, L. 1935.

89-1415. (7194.7) Supplementary nature of act. This act is intended to supplement but not to repeal or to change in any way the procedure authorized by section 89-1401 in relation to changing the boundaries of irrigation districts.

History: En. Sec. 7, Ch. 132, L. 1935.

89-1416. (7194.8) "Owners" defined—singular includes plural—masculine includes feminine. The term "owners" as used in this act, shall include

any executor, administrator, trustee of an express trust, and the guardian of any ward. The singular shall include the plural and the masculine the feminine.

History: En. Sec. 8, Ch. 132, L. 1935.

CHAPTER 15

IRRIGATION DISTRICTS—CONSTRUCTION OF WORKS

Section 89-1501. Contracts.

89-1501. (7195) Contracts. The construction by the district of all irrigation works of every kind whatsoever, amounting to five thousand dollars or more, shall be done by contract, and, before any such contract is let, the board of commissioners shall employ competent engineers to make surveys, plans, maps, and estimates which shall include everything necessary to show the entire cost in detail of everything necessary to complete the work required to irrigate any of the lands in the district under the proposed system. Notice of any contract to be awarded for the construction of such works shall state where the plans and specifications may be seen, and shall be published at least once a week for three successive calendar weeks in a newspaper published or of general circulation in the county where the office of the district is located. Sealed bids shall be called for in such published notice, and bids shall be opened in public, and the contract shall be awarded only to the lowest responsible bidder, who shall be required to give bond for the faithful performance and completion of the contract. The board shall have the right to reject any and all bids in its discretion. The provisions of this section shall not apply to any contract for the completion of works in course of construction by private owners, from whom said works may be acquired under the provisions of section 89-1301; provided, that the provisions of this section shall not apply in the case of any contract between the district and the United States.

History: En. Sec. 25, Ch. 146, L. 1909;
amd. Sec. 4, Ch. 145, L. 1915; re-en. Sec.
7195, R. C. M. 1921.

Waters and Water Courses—228½.

67 C.J. Waters § 903.

43 Am. Jur. 737, Public Works and Contracts.

CHAPTER 16

IRRIGATION DISTRICTS—RIGHTS-OF-WAY—USE AND APPORTIONMENT OF WATER

- Section 89-1601. Rights-of-way.
89-1602. Noninterference with navigation or water-rights.
89-1603. Diversion of waters.
89-1604. Leasing of works or water.
89-1605. Title to property of district.
89-1606. Use of water, etc., a public use.
89-1607. Board to apportion water.
89-1608. Reduction in case of shortage.
89-1609. Surplus water.
89-1610. Lands under irrigation from same or other sources.
89-1611. Substitution of water.
89-1612. All lands already under irrigation not chargeable except by consent and for certain purposes.

- 89-1613. Distribution system defined.
- 89-1614. Commissioners' power to regulate, supervise, apportion and control distribution of water.
- 89-1615. Right of commissioners to enter on land.
- 89-1616. Penalty for interfering with commissioners or with distribution system.
- 89-1617. Power of commissioners to install and assess cost of distributing or measuring devices.

89-1601. (7196) Rights-of-way. The board of commissioners shall have the power to construct the said irrigation works across any stream of water, watercourse, street, avenue, highway, railway, canal, ditch, or flume which the route of said canal or canals may intersect or cross, in such manner as to afford security to life and property; but said board shall restore the same, when so crossed or intersected, to its former state, as near as may be, so as not to destroy its usefulness; and every company whose railroad shall be intersected or crossed by said works shall unite with said board in forming said intersection and crossing; and if such railroad company and said board, or the owners and controllers of said property, thing, or franchise so to be crossed cannot agree upon the amount to be paid therefor, or the points or the manner of said crossing or intersections, the same shall be ascertained and determined in all respects as herein provided in respect to taking of land for public use.

But nothing herein contained shall require the payment to the state, or any subdivision thereof, of any sum for the right to cross any public highway with any such works. The right-of-way is hereby given, dedicated, and set apart to locate, construct, and maintain said works over and through any of the lands which are now or hereafter may be the property of this state.

History: En. Sec. 26, Ch. 146, L. 1909; Eminent Domain ~~§~~ 47(1), 50; Waters
re-en. Sec. 7196, R. C. M. 1921. and Water Courses ~~§~~ 228, 242.
29 C.J.S. Eminent Domain §§ 75, 80, 84;
67 C.J. Waters § 901 et seq.

89-1602. (7197) Noninterference with navigation or water-rights. Navigation shall never in anywise be impeded by the operation of this act, nor shall any vested interest in or to any mining or agricultural water-rights or ditches, or in or to any water-rights, or reservoirs, or dams now used beneficially by the owners or possessors thereof, in connection with any mining or agricultural industry, or by persons purchasing or renting the use thereof, or in or to any other property now used, directly or indirectly, in carrying on or in promoting the mining or agricultural industry, ever be affected by or taken under its provisions, save and except that rights-of-way may be acquired over the same; provided, further, that the right of eminent domain shall not be otherwise considered abridged by the provisions hereof.

History: En. Sec. 27, Ch. 146, L. 1909;
re-en. Sec. 7197, R. C. M. 1921.

89-1603. (7198) Diversion of waters. Nothing herein contained shall be deemed to authorize the diversion of the waters of any river, creek, stream, canal, or ditch from its channel, to the detriment of any person or persons having an interest in such river, creek, stream, canal, or ditch, or the waters therein.

History: En. Sec. 28, Ch. 146, L. 1909; Waters and Water Courses \S 781½, 256.
re-en. Sec. 7198, R. C. M. 1921. 67 C.J. Waters \S 162 et seq., 1073 et
seq.

89-1604. (7199) Leasing of works or water. The board of commissioners shall have the power, with the written consent of a majority in number and acreage of the owners of the lands in the district, to lease in whole or in part the system of canals and works or water belonging to the district, whenever such leasing may be deemed for the benefit of the district; provided, that when said board contemplates the leasing of the canals or works or water of such district, they shall so declare by resolution or order, and give notice thereof by publishing the same in some newspaper published in the county in which the office of such irrigation district is situated, at least two calendar weeks prior to the making of any lease; provided, however, that no such lease shall be made unless a majority in number and acreage of the holders of title or evidence of title to the lands in the district shall file with the board a written consent to make such lease. Such lease shall in no way interfere with any rights that may have been established by law at the time such lease is made, nor shall such lease operate so as to deprive any owner or owners of land in such district of the use of water from such works upon such lands; and further provided, that the board of commissioners shall require a good and sufficient bond to secure the faithful performance of the lease by the lessee.

History: En. Sec. 29, Ch. 146, L. 1909;
re-en. Sec. 7199, R. C. M. 1921.

89-1605. (7200) Title to property of district. The legal title to all property acquired by or for any irrigation district under the provisions of this act shall immediately and by operation of law vest in such district, as set forth in this act. And the board of commissioners is hereby authorized and empowered to hold, use, maintain, acquire, manage, occupy, and possess said property, as herein provided; provided, however, that any property so acquired by the district may be conveyed to the United States in so far as the same may be needed for the construction, operation, and maintenance of works by the United States for the benefit of the district, under any contract that may be entered into with the United States pursuant to this act.

History: En. Sec. 30, Ch. 146, L. 1909;
amd. Sec. 5, Ch. 153, L. 1917; re-en. Sec.
7200, R. C. M. 1921.

89-1606. (7201) Use of water, etc., a public use. The use of all water required for the irrigation of the land of any district formed under the provisions of this act, together with the rights-of-way for canals and ditches, sites for reservoir, and all property required in fully carrying out the provisions of this act, is hereby declared to be a public use, subject to the regulations and control of the state in the manner prescribed by law; provided, all water, the right to the use of which is acquired by the district under any contract with the United States, shall be distributed and apportioned by the district in accordance with the acts of congress and rules and regulations of the secretary of the interior, and the provisions of said contract in relation thereto.

History: En. Sec. 31, Ch. 146, L. 1909; amd. Sec. 5, Ch. 145, L. 1915; re-en. Sec. 7201, R. C. M. 1921.

Waters and Water Courses—228, 248 et seq.

67 C.J. Waters §§ 901 et seq., 1054 et seq.

30 Am. Jur. 598, Irrigation, §§ 3 et seq.

89-1607. (7202) Board to apportion water. The board of commissioners shall apportion the water for irrigation among the lands in the district in a just and equitable manner, and the maximum amount apportioned to any land shall be the amount that can be beneficially used on said land, and such amount of water shall become and shall be appurtenant to the land and inseparable from the same, but subject to reduction as hereinafter provided; provided, however, that any water owner of the district shall have the right to sell or assign for one season any of the water apportioned to him, and not required for use upon the land to which such water belongs; provided, all water, the right to the use of which is acquired by the district under any contract with the United States, shall be distributed and apportioned by the district in accordance with the acts of congress, and rules and regulations of the secretary of the interior, and the provisions of said contract in relation thereto.

History: En. Sec. 32, Ch. 146, L. 1909; amd. Sec. 6, Ch. 145, L. 1915; re-en. Sec. 7202, R. C. M. 1921.

Injunction to Prevent Diversion Outside District

Held, in a proceeding to enjoin water users in an irrigation district from interfering with the right of a like user to convey water from the district, after using all he could beneficially use upon his land included in the district, to lands owned

by him outside the district, that plaintiff in so diverting water was injuring owners within the district and depriving them of water in which they had a vested right, and the court correctly enjoined him, without passing on his right of assignment because none of his land in the district was unirrigated and there was nothing for him to assign within the meaning of this section. *Koch v. Colvin*, 110 M 594, 597, 105 P 2d 334.

89-1608. (7203) Reduction in case of shortage. In the event of a shortage of water, the amount of water delivered to each particular tract or piece of land shall be reduced proportionately; provided, all water, the right to the use of which is acquired by the district under any contract with the United States, shall be distributed and apportioned by the district in accordance with the acts of congress and rules and regulations of the secretary of the interior, and the provisions of said contract in relation thereto.

History: En. Sec. 33, Ch. 146, L. 1909; amd. Sec. 7, Ch. 145, L. 1915; re-en. Sec. 7203, R. C. M. 1921.

89-1609. (7204) Surplus water. All surplus water belonging to the district may be sold or disposed of by the board for the benefit of the district; provided, all water, the right to the use of which is acquired by the district under any contract with the United States, shall be distributed and apportioned by the district in accordance with the acts of congress and rules and regulations of the secretary of the interior, and the provisions of said contract in relation thereto.

History: En. Sec. 34, Ch. 146, L. 1909; amd. Sec. 8, Ch. 145, L. 1915; re-en. Sec. 7204, R. C. M. 1921.

Waters and Water Courses—228½, 254.

67 C.J. Waters §§ 903, 1076 et seq.

89-1610. (7205) Lands under irrigation from same or other sources. Any land already under irrigation from any source may be included in any irrigation district, either at the time of the organization of such district or at any time thereafter, and such land shall be entitled to receive and shall be given the same amount of water necessarily used thereon at the time of such inclusion; and the canals, ditches, flumes, dams, or other works previously used to irrigate such land may be used or supplanted either wholly or in part by the district works; provided, however, that the owner of such land, canals, ditches, flumes, dams, or other works shall be entitled to compensation for any and all damage sustained by reason of the appropriation of the same, or by the construction of said district works; provided, however, that lands already under irrigation, or lands having water-rights appurtenant thereto, or lands which can be irrigated from sources more feasible than the district system, shall not be included within such district, unless the owner of such lands shall consent in writing to have such lands included in said district; provided, however, that districts formed to co-operate with the United States may extend their boundaries to include such lands, upon petition of the owners of two-thirds only of the acreage of the lands to be included, and the boundaries shall be susceptible of change as in sections 89-1402 to 89-1408 provided; and provided, further, that all lands having water-rights appurtenant thereto, which are served by a system of irrigation works supplying more than ten thousand acres of land, may, in the discretion of the court, be included in the proposed district, on petition of at least a majority both in number and acreage of the holders of title or evidence of title to the land having water-rights appurtenant thereto, and served by the same system of irrigation works.

History: En. Sec. 35, Ch. 146, L. 1909; amd. Sec. 6, Ch. 153, L. 1917; amd. Sec. 4, Ch. 116, L. 1919; re-en. Sec. 7205, R. C. M. 1921.

References

Scillely v. Red Lodge-Rosebud Irr. Dist., 83 M 282, 305, 272 P 543.

Waters and Water Courses 226 et seq.
67 C.J. Waters § 878 et seq.

89-1611. (7206) Substitution of water. Whenever any canal constructed, owned, or controlled by the district crosses any creek, stream, water channel or course, the water of which is used to irrigate land lying below such canal, the district shall have the right to contract with the owner or owners of the right to the use of the water or waters in any such stream, creek, water channel or course, for an exchange of water, and to supply him with water from the district system, which contract shall be in writing, signed and acknowledged by all the parties thereto before some officer authorized to take acknowledgments, which acknowledgment shall be certified by such officer in the manner that deeds are now required to be certified to entitle them to be recorded, and shall be filed and recorded in the office of the clerk and recorder of the county in which the creek, stream, water channel or course is situated, and thereafter such district shall have the right to supply such land below the canal, whether such land is included in the district or not, with water from the works of the district, and the owner or lessee of such land shall, in such case, be furnished with the same quantity of water as that to which such owner or lessee would be

entitled out of such creek, stream, water channel or course, had the district works not been built. The district shall have the right to appropriate and take possession of the water so replaced, and shall have the same right to such water as the owner or lessee of the land had, so long as such water shall be replaced by a like quantity of water from such works, but the appropriating and taking of such water by the district shall never deprive such owner or lessee of the right to retake and use the same, should such owner or lessee at any time be prevented from having or using a like quantity of water from such works; and the district shall also have the right to make appropriation and take possession of such water at any point, and to sell, lease, or use such water on any land, either above or below the canal, and the appropriation of such water at any point, or selling, leasing, or using the same, shall not prejudice the right of the district to the water, and shall not increase the rights of the owner or owners of any other water right on such creek, stream, water channel or course; provided, all water, the right to the use of which is acquired by the district under any contract with the United States, shall be distributed and apportioned by the district in accordance with the acts of congress and rules and regulations of the secretary of the interior, and the provisions of said contract in relation thereto.

History: En. Sec. 36, Ch. 146, L. 1909;
amd. Sec. 9, Ch. 145, L. 1915; re-en. Sec.
7206, R. C. M. 1921.

89-1612. (7207) All lands already under irrigation not chargeable except by consent and for certain purposes. Where lands already under irrigation, the water and irrigation works irrigating the same belonging to the owner of said lands, are included in any district, such lands shall not be charged with any tax or assessment for construction or for payment of the interest or principal of any bonds issued to secure money for construction or purchase of the district irrigation works, or for any payments other than for operation and maintenance, due or to become due under any contract between the district and the United States, accompanying which bonds of the district have not been deposited with the United States as in section 89-1301 provided, except with the consent of the owner thereof, which consent shall be filed with the recorder of deeds of the county in which such lands are situated, but such lands shall be assessed for administrative and maintenance purposes the same as other lands in the district.

History: En. Sec. 37, Ch. 146, L. 1909; Waters and Water Courses 231.
amd. Sec. 10, Ch. 145, L. 1915; re-en. Sec. 67 C.J. Waters § 925 et seq.
7207, R. C. M. 1921.

89-1613. (7207.1) Distribution system defined. The words "distribution system" as used in this act, shall denote the entire works and property of all irrigation districts, including main ditches and canals, laterals, by-laterals, head gates, flumes, spillways, boxes and all other appliances and means by which the waters of any irrigation district are or shall be apportioned or distributed for use.

History: En. Sec. 1, Ch. 63, L. 1935.

89-1614. (7207.2) Commissioners' power to regulate, supervise, apportion and control distribution of water. In addition to all other powers

granted them by the laws of Montana, boards of commissioners of all irrigation districts now or hereafter organized under any law of this state, shall have the power and authority to regulate, supervise, apportion and control the furnishing and delivery of water through the distribution system of the district; provided, that such authority to regulate, supervise, apportion and control shall not apply to users who have water rights or ditch rights, established, acquired by court decree, use, appropriation or otherwise, at the time or prior to the organization of such district, without regard to whether said distribution system, or any portion thereof belongs to the district or to the owner of lands served by said district.

History: En. Sec. 2, Ch. 63, L. 1935.

Waters and Water Courses ⇨ 227, 228.
67 C.J. Waters §§ 892 et seq., 901 et seq.

89-1615. (7207.3) Right of commissioners to enter on land. In carrying out the authority granted them by this act, it shall be lawful for boards of commissioners of irrigation districts to enter upon the lands of any user of water supplied by said district, for the purpose of installing, adjusting or regulating head gates, lock boxes or other devices for regulating the flow of water or apportioning the equitable distribution thereof.

History: En. Sec. 3, Ch. 63, L. 1935.

89-1616. (7207.4) Penalty for interfering with commissioners or with distribution system. Any person who shall in any manner interfere with the commissioners of an irrigation district, or their lawful agent or employee in the carrying out of the powers conferred by this act, or who shall change or tamper with any lock box, head gate or other device for the apportionment or distribution of water, installed by or under the authority of such commissioners, or who shall in any manner obstruct or change the flow of water in the distribution system of any irrigation district without authority of the commissioners of the district, shall in the discretion of the commissioners, be subject to a forfeiture of his right to the delivery of water through the distribution system of the district, so long as such acts shall continue, and shall likewise be guilty of a misdemeanor and, on conviction, shall be punishable by a fine of not less than ten dollars (\$10.00) nor more than one hundred dollars (\$100.00), or by imprisonment in the county jail for not less than one (1) day nor more than thirty (30) days or by both such fine and imprisonment.

History: En. Sec. 4, Ch. 63, L. 1935.

Waters and Water Courses ⇨ 228, 266.
67 C.J. Waters §§ 901 et seq., 1118.

Cross-Reference

Obstructing or taking water from irrigation ditches, sec. 94-3204.

89-1617. (7207.5) Power of commissioners to install and assess cost of distributing or measuring devices. Whenever, in the judgment of the commissioners of any irrigation district, it is necessary for the proper measurement, distribution or apportionment of the water of the district, to install lock boxes, head gates or other devices for the distribution of water at the point where any lateral is taken out of a main ditch or canal, or at a point where any sub-lateral is taken out of a lateral for further division or distribution of water, they shall have the authority to procure and install the same and to assess the cost thereof against the lands affected thereby.

History: En. Sec. 5, Ch. 63, L. 1935.

Waters and Water Courses 231.
67 C.J. Waters § 925 et seq.

References

State ex rel. Swanson v. District Court,
107 M 203, 211, 82 P 2d 779.

CHAPTER 17

IRRIGATION DISTRICTS—BONDS

Section 89-1701.	Limitations on debt-incurring power.
89-1702.	Exemption of irrigation district property.
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89-1712.	Refunding bonds—authorization for issuance.
89-1713.	Purpose of bonds—petition, requirements and contents of.
89-1714.	Provisions of existing laws applicable.
89-1715.	Limitation of actions attacking decrees—validation of districts and district acts.

89-1701. (7208) Limitations on debt-incurring power. The board of commissioners or other officers of the district shall have no power to incur any debt or liability whatever, either by issuing bonds or otherwise, except as provided in this act; and any debt or liability incurred in excess of such express provisions shall be and remain absolutely void, except that for the purpose of organization or for any of the immediate purposes of this act, or to make or purchase surveys, plans, and specifications, or for stream gauging and gathering data, or to make any repairs occasioned by any calamity or other unforeseen contingency, the board of commissioners may, in any one year, incur the indebtedness of as many dollars as there are acres in the district, and may cause warrants of the district to issue therefor, bearing interest at the rate not to exceed six per centum per annum.

History: En. Sec. 38, Ch. 146, L. 1909; amd. Sec. 1, Ch. 110, L. 1913; amd. Sec. 1, Ch. 127, L. 1913; re-en. Sec. 7208, R. C. M. 1921. See also Sec. 89-1901.

When Federal Court Required to Follow Montana Supreme Court Decisions

The federal courts, in determining whether bonds issued by Montana irrigation district were general obligations of the district, were required to follow decisions of the supreme court of Montana holding that such bonds, issued pursuant to Montana statutes, were not general obligations of the irrigation district, but merely a charge against land within the district. (Citing secs. 89-1701, 89-1703, 89-1706, 7226 and 7229, R. C. M. 1935 since repealed, 89-1714 and 89-1801). Toole Coun-

ty Irrigation District v. Moody, 125 F 2d 498.

Where Subsequent Agreement Void as to Making Bonds General Obligations of District

Recovery could not be had against district in action on irrigation district bonds on ground that bonds, even if not general obligations of district when issued, had become so by reason of a subsequent agreement, where action was not based on the agreement and agreement, in so far as it purported to make the bonds general obligations of district, was void. Toole County Irrigation District v. Moody, 125 F 2d 498.

References

State et al. v. Board of Commissioners et al., 89 M 37, 296 P 1.

Waters and Water Courses—230.
67 C.J. Waters § 910 et seq.

43 Am. Jur. 287, Public Securities and
Obligations, §§ 21 et seq.

89-1702. (7209) Exemption of irrigation district property. The bonds issued under the provisions of this act, rights-of-way, ditches, flumes, pipelines, dams, water-rights, reservoirs, and other property of like character, belonging to any irrigation district, shall not be taxed for state, county, or municipal purposes.

History: En. Sec. 39, Ch. 146, L. 1909;
re-en. Sec. 7209, R. C. M. 1921.

county or municipal purposes? Crow Creek
Irr. Dist. v. Crittenden, 71 M 66, 72, 227
P 63.

Operation and Effect

Quaere: Had the legislature authority
to declare by this section that irrigation
districts shall not be taxed for state,

Taxation—234.

61 C.J. Taxation § 497.

89-1703. (7210) Petition for bonds and action thereon. (1) For the purpose of providing the necessary funds for constructing the necessary irrigation canals and works, including drainage works, and works for the generation and distribution of electrical energy within said district, and acquiring the necessary property and rights therefor, and for the purpose of acquiring by purchase, or otherwise, waters, water rights, canals, reservoirs, reservoir sites, and irrigation works, drainage works, and works for the generation and distribution of electrical energy constructed, or partially constructed, and for the purpose of meeting the expense theretofore incurred or to be thereafter incurred incident to such construction or acquisition of such works and property, including administrative, engineering and legal expenses, and for the assumption, as principal or guarantor, of indebtedness to the United States on account of district lands, and for the purpose of otherwise carrying out the provisions of this act, and of providing a sum sufficient to pay the interest on all of such bonds for five (5) years, or less, the board of commissioners of any district, heretofore or hereafter organized under the provisions of this act, may authorize and issue the negotiable coupon bonds of the district, as and in the manner hereinafter provided. A sum sufficient to redeem or pay all, or any portion, of the existing indebtedness of such district, evidenced by outstanding bonds, delinquent interest coupons and accrued interest, or warrants, together with all delinquent and accrued interest, whether such indebtedness be due or not due, or which has or may hereafter become payable at the option of the district, or by consent of the bondholders, or by any lawful means, may be included as a portion of the necessary funds for which said bonds are authorized and issued.

(2) No bonds provided for in this section shall be authorized or issued by or on behalf of any irrigation district organized hereunder, and no contract shall be made with the United States as in section 89-1301, provided, except upon a petition signed by at least sixty per centum (60%) in number and acreage of the holders of title or evidence of title to lands included within said district, or by seventy-five per centum (75%) in number and acreage of the holders of title or evidence of title to such lands who are residents of the county or counties in which lands of the district are situated. Such petition shall be addressed to the board of commissioners; shall set forth the aggregate amount of bonds to be issued, and the purpose or purposes

thereof; shall have attached thereto an affidavit verifying the signatures to said petition; and shall be filed with the secretary of the board of commissioners. When bonds, however, are issued for the sole purpose of redeeming or paying the existing and outstanding bonds or warrants, or both, including delinquent and accrued interest, of such district, such bonds may be authorized and issued in the manner provided for by sections 89-1712 and 89-1713.

(3) Upon the filing of such petition, the board of commissioners shall, by appropriate order or resolution, authorize and direct the issuance of the bonds of the district to the amount and for the purpose or purposes specified in the petition, fix the numbers, denominations, and maturity or maturities of said bonds; specify the rate of interest thereon; and whether payable annually or semi-annually; designate the place of payment of said bonds and the interest coupons, within or without the state of Montana; prescribe the form of said bonds and interest coupons to be attached thereto; and provide for the levy of a special tax, or assessment as in this act provided on all the lands in the district for the irrigation and benefit of which said district was organized and said bonds are issued, or said contract is to be made, sufficient in amount to pay the interest on and principal of said bonds when due and all amounts to be paid to the United States under any contract between the district and the United States, accompanying which bonds of the district have not been deposited with the United States as in section 89-1301 provided.

(4) If contract is to be made with the United States as in section 89-1301 provided, and bonds are not to be deposited with the United States in connection with such contract, the board of commissioners need not authorize the issuance of bonds, or if bonds are required in addition to such contract, may authorize bonds only for the amount needed in addition to such contract. Such order or resolution shall also provide for the confirmation proceedings in the district court hereinafter mentioned.

History: En. Sec. 40, Ch. 146, L. 1909; amd. Sec. 11, Ch. 145, L. 1915; amd. Sec. 7, Ch. 153, L. 1917; amd. Sec. 5, Ch. 116, L. 1919; re-en. Sec. 7210, R. C. M. 1921; amd. Sec. 7, Ch. 157, L. 1923; amd. Sec. 1, Ch. 185, L. 1929.

Effect of Federal Court's Application of Montana Decisions

The federal courts, in determining whether bonds issued by Montana irrigation district constituted general obligations of district, were required to give effect to decisions of Montana supreme court holding that bonds, which had been issued prior to decisions, were not general obligations of district as against contention that such action would amount to giving the decisions a "retroactive" effect. Such application did not constitute an "impairment of obligation of contract," since the court's decision was merely that the obligation allegedly impaired, did not exist; notwithstanding that those decisions were in conflict with earlier decisions of

the Montana court. *Toole County Irrigation District v. Moody*, 125 F 2d 498.

Effect of Final Judgment

Upon its creation an irrigation district becomes absolute as an entity and has the power of issuing bonds against the lands embraced in its confines for the purpose of carrying out the provisions of the Act under which created, and if the board of commissioners orders bonds issued and no appeal is taken from the judgment of the district court confirming and ratifying the proceedings of the board, the judgment cannot thereafter be called in question in the absence of allegation and proof of fraud. *Drake v. Schoregge et al.*, 85 M 94, 100, 277 P 627.

Extent of Liability

Held, that the irrigation district statute that the bonds of an irrigation district—a public corporation—create a general indebtedness against the district in the sense that all the lands therein are taxable for

the payment of the bonds and interest until the entire indebtedness is paid, and that therefore the lands of an owner who has paid his assessment are not released from liability for further assessments made necessary by delinquencies of others, until the bonded indebtedness with interest is discharged in full. *Cosman v. Chestnut Valley Irr. Dist.*, 74 M 111, 114, 238 P 879.

Held, that in the collection of tax or assessment levied by an irrigation district for the payment of the interest on bonds issued by it, the county treasurer is not authorized to seize and sell personal property of a delinquent owner of lands within the district, but must proceed in the manner prescribed by Chapter 199 of the Political Code R. C. M. 1935, (84-4101 et seq.) for the collection of state and county taxes made a lien upon real property. *State v. Nicholson*, 74 M 346, 351, 240 P 837.

Operation and Effect

In June, 1929, proceedings for the refunding of irrigation district bonds were had under section 89-1703, as amended by Chapter 157, Laws of 1923, providing for the authorization of such bonds in the mode prescribed by section 7226, R. C. M. 1921, as amended by the same chapter. Section 7210 (89-1703) was amended by Chapter 185, Laws of 1929, which Act, however, did not become effective until July 1, 1929. Section 7226, R. C. M. 1921, was repealed by Chapter 155 of the 1929 Laws and was not in effect when the bonds were authorized. Held, on appeal from a judgment dismissing an

action to enjoin the issuance of the bonds, that the repeal of Section 7226, incorporated by reference in Section 89-1703, did not affect the latter section and that injunction was properly denied. *Gustafson v. Hammond Irr. Dist.*, 87 M 217, 219, 287 P 640.

Remedy for Enforcement

While the law under which public bonds are issued becomes as much a part of the contract with the bondholders as though incorporated in the bonds, the legislature may by subsequent statutes change the remedy given them to enforce payment, provided the new remedy is as efficacious as the one afforded under the original Act; otherwise the obligations of the contract would be impaired contrary to the provisions of sec. 10, art. I, of the federal Constitution. *State et al. v. Board of Commissioners et al.*, 89 M 37, 80, 296 P 1.

References

Cited or applied as section 40, chapter 146, Laws of 1909, before amendment, in *O'Neill v. Yellowstone Irr. Dist.*, 44 M 492, 508, 121 P 283; *Crow Creek Irr. Dist. v. Crittenden*, 71 M 66, 71, 227 P 63; *In re Fort Shaw Irr. Dist.*, 81 M 170, 176, 261 P 962; *Tomich v. Union Trust Co.*, 31 F 2d 515; *Midland Development Co. v. Cove Irrigation District et al.*, 102 M 479, 480, 58 P 2d 1001; *Toole County Irrigation District v. State*, 104 M 420, 429, 67 P 2d 989.

Bonds generally. 30 Am. Jur. 658, Irrigation, §§ 87-90.

89-1704. (7211) Confirmation by district court. (1) Within ten (10) days after the adoption of the order or resolution mentioned in the preceding section, the board of commissioners shall file a petition in the district court of the judicial district wherein is located the office of said board, to determine the validity of the proceedings had relative to the issuance of said bonds and to the levy of said special tax or assessment.

Such action shall be in the nature of a proceeding in rem, and jurisdiction of all parties interested shall be had by notice given as hereinafter provided. Such petition shall set forth (1) generally, the establishment and organization of the district; (2) a certified copy of the petition mentioned in the preceding section; (3) a certified copy of the order or resolution mentioned in the preceding section; (4) a prayer for the confirmation of the proceedings of the board stated in the petition, and for the confirmation of the bond issue and the special tax or assessment levied to pay the bonds and interest thereon.

(2) Upon the filing of said petition in the district court, the court or judge thereof shall fix the time for the hearing of said petition, which shall not be less than fifteen (15) days from the date of filing the petition in said court, and shall order the clerk of the court to give notice of the filing of said petition and the date of the hearing thereon, by publication at least once

a week for two calendar weeks in a newspaper published or of general circulation in the county where the office of the board of commissioners of the district is situated, and also by posting a written or printed copy of such notice in at least three public places in each division of the district, the first of such publications and such posting to be not less than fifteen (15) days prior to the date fixed for said hearing.

(3) Said notice shall state the substance of the petition and the time and place fixed for the hearing thereon, and that any person interested in or whose rights may be affected by the issuance or sale of said bonds, or the levy of said special tax or assessment, or the proceedings had or to be had by the said board of commissioners with respect to said matters, may, on or before the day fixed for the hearing of said petition, demur to or answer said petition, and may appear at said hearing and contest the granting of the prayer of said petition, and the entry of any order of confirmation pursuant thereto.

Any person interested in or whose rights may be affected by the issuance or sale of said bonds, or the levy of said special tax or assessment, or the proceedings had or to be had by the board of commissioners of the district in connection with said matters, and the entry of any order of confirmation pursuant thereto, may enter his appearance in such proceedings and demur to or answer said petition and contest the granting of the prayer of said petition.

(4) The provisions of Title 93 respecting the demurrer or answer to a verified complaint shall be applicable to a demurrer or answer to said petition. The persons so demurring to or answering said petition shall be the defendants in the proceeding, and the board of commissioners shall be the plaintiff. Every material statement of the petition, not specifically controverted by the answer, shall be taken as true, and every holder of title or evidence of title to lands included in the district failing to answer or demur to the petition shall be deemed to admit as true all the material statements hereof. The procedure in such action shall be determined by Title 93.

(5) Upon the hearing the district court shall find and determine whether the provisions and requirements of the preceding section have been complied with, and notice of the filing of the petition in the district court and of the time and place of the hearing thereon has been duly given for the time and in the manner herein prescribed, and shall have power and jurisdiction to examine and determine the regularity, legality, and validity of the proceedings had preliminary and relative to the issuance of the bonds, and the levy of the special tax or assessment in the petition mentioned, and the legality and validity of said bonds and special tax or assessment, and any and all actions taken by the board of commissioners in connection with said matters, and shall hear all objections filed to said proceedings, or any part thereof, or to the issuance of said bonds, or the levy of the said special tax or assessment or any portion thereof. The court, in inquiring into the regularity, legality, and validity of said proceedings, shall disregard any error, omission, or other irregularity which does not affect the substantial rights of the parties to said proceedings. The court may ratify, approve, and confirm said proceedings

in whole or in part, and may ratify, approve, and confirm said bonds and special tax or assessment, and enter its judgment or decree accordingly.

(6) From any such judgment or decree an appeal may be taken to the supreme court at any time within ten (10) days from the entry of such judgment or decree. Such appeal shall be taken, perfected, and heard in the manner prescribed by Title 93 covering appeals from district courts to the supreme court. If no such appeal be taken within the time aforesaid, or if taken and the judgment or decree of the district court be affirmed by the supreme court, such judgment or decree shall be forever conclusive upon all the world as to the validity of such bonds and said special tax or assessment, and the same shall never be called into question in any court in the state. The costs of said proceedings shall be allowed or apportioned between the parties in the discretion of the court.

History: En. Sec. 41, Ch. 146, L. 1909; re-en. Sec. 7211, R. C. M. 1921; amd. Sec. 1, Ch. 161, L. 1923; amd. Sec. 2, Ch. 185, L. 1929.

Appearance by Objectors

Held, in a proceeding instituted by the commissioners of an irrigation district under section 89-1703 et seq., as amended, to secure confirmation of a contemplated contract with the United States to take over irrigation works constructed by the federal government and to raise the necessary funds by assessments upon the irrigable lands in the district, that in view of the rather vague procedure outlined in this section, as amended by section 1 of Chapter 161, Laws of 1923, as to what shall constitute an appearance by objecting owners, their verified objections, which in effect are answers by way of confession and avoidance, were properly treated as answers. In re Fort Shaw Irr. Dist., 81 M 170, 176 et seq., 261 P 962.

Effect of Confirmation

In the absence of fraud in the proceedings, the order of the district court establishing the district, and that directing the issuance of bonds, are, unless appeals be taken from said orders within the prescribed time, res adjudicata, and constitute an estoppel against thereafter litigating the validity of district bonds. O'Neill v. Yellowstone Irr. Dist., 44 M 492, 511, 121 P 283.

Upon its creation an irrigation district becomes absolute as an entity and has the power of issuing bonds against the lands embraced in its confines for the purpose of carrying out the provisions of the Act under which created, and if the board of commissioners orders bonds issued and no appeal is taken from the judgment of the district court confirming and ratifying the proceedings of the board, the judgment cannot thereafter be called in question in the absence of allegation and proof of

fraud. Drake v. Schoregge et al., 85 M 94, 102, 277 P 627.

Under this and the preceding section, held, under the rule that the power to decide includes the power to decide wrongly, and unless corrected in a manner provided by law an erroneous decision is as binding as one that is correct, that a decree confirming bond proceedings, from which no appeal was taken, could not be set aside in an independent equitable action on ground court exceeded its power in deciding the tax levy was authorized by section 89-1703. Midland Development Co. v. Cove Irrigation District, 102 M 479, 58 P 2d 1001.

Effect of Failure to Appeal

Landowners and mortgagees of land in district, who did not appeal from order and decree ratifying, approving, and confirming issuance of bonds for irrigation district under section 89-1703 and this section, were concluded thereby, and cannot question decree in suit to enjoin payment of bonds and collection of taxes for payment thereof. Tomich v. Union Trust Co., 31 F 2d 515.

Effect of Failure to Object or Contest

Landowner, whose land was described in petition for organization of irrigation district under sections 89-1202 to 89-1206, and for issuance of bonds under section 89-1703 and this section, and who had notice of proceedings, but did not appear at hearing and object to inclusion of his land, could not question court's conclusion collaterally in suit to enjoin collection or payment of bonds issued, and to enjoin collection of taxes for payment thereof. Tomich v. Union Trust Co., 31 F 2d 515.

Pleading

Plaintiff's allegations that there existed an encumbrance on land within an irrigation district by virtue of a bond issue and that such issue had been regularly made, levied and issued were mere legal conclu-

sions; to show the validity of the bond issue, proper pleading required a showing that the district court had made an order of confirmation, which, if made, may be alleged as "having been duly given and made," under section 93-3806. *Clark v. Demers*, 78 M 287, 291, 254 P 162.

What May Be Considered on Appeal

In a proceeding for the confirmation of a resolution passed the commissioners of an irrigation district for the execution of a contract with the United States to take over federal irrigation works, instituted pursuant to the provisions of this section, the question whether nonirrigable lands were subject to the contemplated tax levy was not one presented for determination and may not be considered on appeal, it being presumed that when the levy is made only irrigable lands will be included within the assessment. In *re Fort Shaw Irr. Dist.*, 81 M 170, 176 et seq., 261 P 962.

When Legality of Bonds Cannot Be Questioned

In an action to have a contract of sale of lands included in an irrigation district which had issued bonds, reformed and liens against the lands arising from the bond issues cancelled on the ground of fraud in the creation of the district, held, that where most of the bonds had been issued before plaintiffs made the purchase, and no appeal had been taken from the judgment of the district court confirming their validity, their legality cannot, under this section be called in question thereafter, the bonds then constituting a lien upon all the lands in the district. *Krueger v. Morris*, 110 M 559, 566, 107 P 2d 142.

References

State et al. v. Board of Commissioners et al., 89 M 37, 105, 296 P 1.

30 Am. Jur. 658, *Irrigation*, §§ 87 et seq.

89-1705. (7212) Details relating to bonds. (1) All bonds issued under the provisions of this act shall be payable in gold coin of the United States, of the standard weight and fineness existing at the time of the issue; and shall run for a period not longer than forty years from their date, but may contain a clause providing for their prior redemption and payment, at the option of the board of commissioners of the district, on any interest payment date after five years from their date. Instead of straight maturity bonds, bonds may be issued to mature serially at such times and in such amounts as the board of commissioners shall determine, but no bonds so issued shall run for a longer period than forty years from the date of issue. Said bonds shall bear interest from their date until paid at a rate not to exceed six per centum per annum, payable annually or semi-annually, the instalments of interest to date of maturity of principal to be evidenced by appropriate coupons attached to each bond. Said bonds and interest coupons shall be payable at such place or places, within or without the state of Montana, as the board of commissioners shall prescribe.

(2) Such bonds shall be of such denomination or denominations, and in such form, as the board of commissioners shall prescribe. An issue of bonds is hereby defined to be all the bonds issued in accordance with a resolution or order of the board of commissioners. Each issue of the bonds of a district shall be numbered consecutively as authorized, and the bonds of each issue shall be numbered consecutively. The board of commissioners shall fix the date of said bonds, or may divide any issue into two or more divisions and fix different dates for the bonds of each respective division. The date of any bond must be subsequent to the order or resolution authorizing it and prior to its delivery to a purchaser from the district.

(3) All bonds issued hereunder shall be signed by the president and attested by the secretary of the board under the corporate seal of the district, and each of the interest coupons to be attached to said bonds shall be executed by the original or engraved or lithographed facsimile signatures of said president and secretary. Each bond shall be signed, and each interest

coupon shall be executed, by the president and secretary of the board of commissioners who may be in office at the date of said bond and coupons, or at any time thereafter prior to the delivery of said bond to the purchaser thereof from the district.

(4) The board of commissioners may provide for the registration of bonds in their discretion. The secretary of the board of commissioners and county treasurer, each shall keep a record of the bonds sold, or otherwise disposed of, their date, number, amount, maturity, or maturities, to whom sold, rate of interest, and the place or places of payment thereof.

History: En. Sec. 42, Ch. 146, L. 1909; amd. Sec. 1, Ch. 17, Ex. L. 1919; re-en. Sec. 7212, R. C. M. 1921; amd. Sec. 8, Ch. 157, L. 1923.

Straight Maturity Bonds Share Pro Rata in Funds Available for Payment

Straight maturity bonds were issued by an irrigation district under this statute prior to its amendment by ch. 157, laws of 1923, as was then permitted. The fund from which they were payable was insufficient to make payment in full and could not be replenished by assessment. The money remaining in the fund was held

properly distributed pro rata among the outstanding bonds, without regard to their numbering, since they were not to mature serially and neither ch. 157, laws of 1923, nor ch. 155, laws of 1929, indicates legislative intent that the bonds as issued did not rank equally in order of payment. State ex rel. Central Auxiliary Corp. v. Rorabeck et al., 111 M 320, 326, 108 P 2d 601.

References

Cited or applied as section 42, chapter 146, laws of 1909, before amendment, in O'Neill v. Yellowstone Irr. Dist., 44 M 492, 513, 121 P 283.

89-1706. (7213) Liens of bonds. All bonds issued hereunder, and all amounts to be paid to the United States under any contract between the district and the United States, accompanying which bonds of the district have not been deposited with the United States as in section 89-1301 provided, shall be a lien upon all the lands originally or at any time included in the district for the irrigation and benefit of which said irrigation district was organized and said bonds were issued, and for the benefit of which such contract between the district and the United States was made, except upon such lands as may at any time be included in such district on account of the exchange or substitution of water under the provisions of section 89-1611, if any there be; and all such lands shall be subject to a special tax or assessment for the payment of the interest on and principal of said bonds; and all amounts to be paid to the United States under any such contract between the district and the United States, and said special tax or assessment, shall constitute a first and prior lien on the land against which levied, to the same extent and with like force and effect as taxes levied for state and county purposes.

History: En. Sec. 43, Ch. 146, L. 1909; amd. Sec. 12, Ch. 145, L. 1915; amd. Sec. 8, Ch. 153, L. 1917; amd. Sec. 8, Ch. 116, L. 1919; re-en. Sec. 7213, R. C. M. 1921.

Operation and Effect

Held, that this section, making bonds issued by an irrigation district a lien upon all the lands in the district, thereby created a lien which constitutes an encumbrance against them, within the meaning of the term "encumbrance" as used in section 84-4161, providing that a tax deed conveys to the grantee absolute title "free of all encumbrances." State et al.

v. Board of Commissioners et al., 89 M 37, 74 et seq., 296 P 1.

Id. Held, that bonds issued by an irrigation district are not a general obligation of the district but are a charge against the lands within it (overruling Cosman v. Chestnut Valley Irrigation District, 74 M 111, 238 P 879); that the lien of the bonds created by this section against the lands in the district sold for delinquent taxes, is extinguished by the tax deed issued to the county and that the purchaser from the county takes title free of the lien of the bonds; that delinquent assessments for the payment of the bonds and interest may not

be included in future assessments made against other lands in the district, the lands sold, however, remaining liable to assessments for maintenance and repairs. (Mr. Justice Galen dissenting as to the holding that the bonds are not a general obligation of the district.)

When Statutory Provision Became Part of Bondholders' Contract

The provision of sec. 7229, R. C. M. 1921 (now repealed) in force in 1919 when district organized, that issued bonds and any assessment made for payment thereon should be a lien upon the lands in the district against which levied, became a part of the bondholders' contract with the district, the same as though it had been incorporated in the bonds. Toole

County Irrigation District v. State, 104 M 420, 436, 67 P 2d 989.

References

Cited or applied as sec. 43, ch. 146, laws of 1909, before amendment, in O'Neill v. Yellowstone Irr. Dist., 44 M 492, 513, 121 P 283; Cosman v. Chestnut Valley Irr. Dist., 74 M 111, 114 et seq., 238 P 879; State v. Nicholson, 74 M 346, 351, 240 P 837; Drake v. Schoregge et al., 85 M 94, 100, 277 P 627; State ex rel. Malott v. Cascade Co., 94 M 394, 398 et seq., 22 P 2d 811; Weinstein v. Black Diamond S. S. Corporation, 31 F 2d 519; State ex rel. Central Auxiliary Corp. v. Rorabeck et al., 111 M 320, 325, 108 P 2d 601; Toole County Irrigation District v. Moody, 125 F. 2d 498, 499.

89-1707. (7214) Sale of bonds—cancellation of unused bonds. (1)

Bonds issued under the provisions of this act shall be issued, negotiated, and sold by or under the direction of the board of commissioners, but shall never be sold for less than ninety per cent. of their par value and accrued interest thereon to date of delivery. The said board may sell said bonds from time to time in such quantities as may be necessary and most advantageous to raise money for the purposes for which said bonds were issued.

(2) Before making any sale the board shall, at a meeting by resolution, declare its intention to sell a specified amount of the bonds, and the day and hour and place of such sale, and shall cause such resolution to be entered in the minutes, and notice of the sale to be given, by publication thereof at least once a week for three successive calendar weeks in some newspaper in the county where the office of the board of commissioners is located, and in any other newspaper within or without the state at its discretion. The notice shall state that sealed proposals will be received by the board at its office, for the purchase of bonds, till the day and hour named in the resolution. At the time appointed the board shall open the proposals and award the purchase of the bonds, or any portion or portions thereof, to the highest responsible bidder or bidders; provided, however, that said board may reject any or all bids. In case no award is made, the board thereafter may either readvertise said bonds, or any part thereof, for sale or sell the same, or any part thereof, at private sale. Coupons evidencing unearned interest shall be detached and cancelled.

(3) Any bonds issued hereunder may, in the discretion of the board of commissioners, be issued direct in payment and satisfaction of the contract or purchase price of any irrigation works, canals, water, water rights, or other property constructed or acquired by or for the district, or may be deposited with the United States as in section 89-1301 provided.

(4) Any bonds which may have been authorized but which have not been sold or deposited as security for funds advanced or to be advanced, and against which the state, United States, or any other person, firm or corporation shall have no claim to or equity in, may be cancelled by the board of commissioners by appropriate resolution or order, and after the cancellation of said bonds the same shall not be sold or otherwise disposed

of and shall be invalid and of no effect, and the board shall have no authority to replace such cancelled bonds without an authorization from the members of the district similar to that which provided for their issuance.

History: En. Sec. 44, Ch. 146, L. 1909; amd. Sec. 13, Ch. 145, L. 1919; re-en. Sec. 7214, R. C. M. 1921; amd. Sec. 9, Ch. 157, L. 1923.

Operation and Effect

Held, that ch. 28, laws of 1923 (45-805), providing that the state, municipal corporations or districts in issuing bonds shall give preference to amortization bonds and accept serial bonds only when the former cannot be negotiated to good advantage, is inapplicable to the issuance of irrigation district bonds, and the provisions of the irrigation law (secs. 89-1703 to 89-1705 and 89-1707), dealing with the subject specially, are controlling. *Walden v. Bitter Root Irr. Dist.*, 68 M 281, 293, 217 P 646.

Transfer of bonds of irrigation district,

in which interest coupons remained on bond, not canceled, and unearned portion of them was repaid to district by transferee, held proper procedure, under this section, requiring that irrigation district bonds should never be sold at less than 90 per cent of value "and accrued interest thereon to date of delivery." *American Surety Co. v. Cove Irr. Dist.*, 24 F. 2d 18.

References

Cited or applied as sec. 44, ch. 146, laws of 1909, before amendment, in *O'Neill v. Yellowstone Irr. Dist.*, 44 M 492, 513, 121 P 283; *State v. Board of County Commrs.*, 86 M 595, 600, 285 P 932.

43 Am. Jur. 373, Public Securities and Obligations, §§ 126 et seq.

89-1708. (7215) Delivery of bonds—disposition of proceeds. In the event that bonds are sold for cash, they shall be delivered by the board of commissioners to the county treasurer of the county wherein the office of the district is located, who shall deliver them to the purchaser upon receipt of the purchase price therefor, and after making a complete record of the same. Delivery of the bonds sold may be made by the county treasurer to the purchaser at any place or places within or without the state of Montana, and said county treasurer may receive the proceeds of the sale of said bonds at said place or places of delivery. The county treasurer shall thereupon place the proceeds of said sale to the credit of said district; and the same shall be paid out by the county treasurer only upon the written order of the board of commissioners, signed by the president and secretary under the seal of the district. Said proceeds shall be expended for the purpose or purposes for which said bonds were issued, and for no other. Provided, in case any portion of the funds realized from the sale of bonds are not needed immediately for the purpose for which said bonds were issued, the board of commissioners whenever, in its judgment, the same may be to the best interests of the district, shall have the power and authority to direct the investment of such funds, or any portion thereof, in interest bearing securities of the United States, or of the state of Montana, or in interest bearing certificates of deposit of national or state banks approved by the state superintendent of banks; provided, however, that in the event of such deposit said banks shall first furnish an indemnity bond to be approved by said board of commissioners and the state superintendent of banks. The county treasurer shall transfer to the credit of the district, and place to the credit of such fund or funds as the board of commissioners may direct, all interest received upon money or securities of the district intrusted to his care.

History: En. Sec. 45, Ch. 146, L. 1909; re-en. Sec. 7215, R. C. M. 1921; amd. Sec. 10, Ch. 157, L. 1923.

References

Crow Creek Irr. Dist. v. Crittenden, 71 M 66, 71, 227 P 63.

89-1709. (7215.1) Amending or supplementing original contracts with United States—authorization—limitation. The board of commissioners of any irrigation district established and organized under and by virtue of the laws of Montana, whenever deemed advisable and to the interests of the district, shall have the power and authority to enter into any contract with the United States supplementing or amending any original contract with the United States, said original contract having been entered into pursuant to the provisions of sections 89-1301, 89-1703 and 89-1704, provided, that such supplementary or amendatory contract does not increase the amount of the principal indebtedness of the district to the United States as it exists at the date of the supplementary or amendatory contract authorized under the provisions of section 89-1703.

History: En. Sec. 1, Ch. 71, L. 1933.

89-1710. (7215.2) Petition not necessary—board to authorize. In case any supplementary or amendatory contract shall be made with the United States hereunder, no petition as required by section 89-1703 shall be necessary, nor shall the board of commissioners of such irrigation district be required to proceed under section 89-1704 for a judicial confirmation of the making of such contract and the terms thereof. It shall be sufficient in the case of a contract made with the United States hereunder for the board of commissioners of any irrigation district to authorize the execution of the same by its president and secretary by appropriate resolution adopted at any regular or special meeting of said board of commissioners.

History: En. Sec. 2, Ch. 71, L. 1933.

89-1711. (7215.3) Ratification of supplementing or amending contracts. Any contract between the United States and any irrigation district heretofore made as a contract supplementing or amending any original contract between the United States and any irrigation district, and which original contract was entered into pursuant to the laws of the state of Montana governing the making of a contract between the United States and an irrigation district, and which said supplementary or amendatory contract was not authorized by petition of the district landowners and thereafter judicially confirmed by a court of competent jurisdiction is hereby ratified, approved, and confirmed as a valid and subsisting contract of such irrigation district.

History: En. Sec. 3, Ch. 71, L. 1933.

89-1712. (7226.1) Refunding bonds—authorization for issuance. Any irrigation district may issue refunding bonds; and all of the provisions of the act relating to the creation, organization, government, management, control, operation, administration and dissolution of irrigation districts under the jurisdiction of the public service commission of Montana, being sections 3953 to 4025, as far as applicable and except as otherwise provided herein, shall apply to such refunding bonds and to the issuance thereof.

History: En. Sec. 1, Ch. 155, L. 1929.

References

NOTE.—Sections 3953 to 4025 were repealed by Ch. 75, laws of 1929. Gustafson v. Hammond Irr. Dist., 87 M 217, 219, 287 P 640.

43 Am. Jur. 392, Public Securities and Obligations, §§ 151 et seq.

Power of municipality or other governmental body to issue refunding bonds to retire obligation in respect of which the

creation and maintenance of a sinking fund by taxation is required by constitutional or statutory provision. 157 ALR 794.

89-1713. (7226.2) Purpose of bonds—petition, requirements and contents of. Any irrigation district may issue such refunding bonds for the purpose of redeeming or paying the indebtedness, or any portion thereof, of the district, whether represented by existing and outstanding bonds, interest coupons thereof, or warrants, or both, including accrued and unpaid interest on said bonds, coupons and warrants, and whether such indebtedness be due or not due, or which has or may hereafter become payable at the option of the district, or by consent bondholders or warrant-holders, or both, or by any legal means, and whether such indebtedness be now existing or may hereafter be created, and there shall not be funds in the treasury of such district available for the payment of the same. Such refunding bonds may be issued in one or more series. The petition for such refunding bonds signed, as required by law, by at least sixty per centum (60%) in number and acreage of the holders of title or evidence of title to the lands included within said district, addressed to the board of directors or commissioners of the district, may contain the following specifications, in addition to the matters now required by law, viz.:

(a) How many series of bonds shall be issued; and

(b) The terms, conditions and liens of the said bonds, and the terms and conditions upon which each of said series of bonds shall be exchanged for outstanding bonds of said district, if the same are to be exchanged and not sold; and any such specifications when set forth in the said petition shall be controlling upon the said board of directors or commissioners. The petitioners shall set forth with particularity in such specifications the contract of exchange to be made and they shall have power to include therein any term, requirement, grant, transfer of property or rights, covenant and condition whatsoever that shall be deemed by the said petitioners to be for the best interests of the said district; and that the board of directors or commissioners of the district shall have the power to authorize and direct the issuance of the said bonds accordingly, and to make any such contract, and to bind the irrigation district thereby.

History: En. Sec. 2, Ch. 155, L. 1929.

89-1714. (7231) Provisions of existing laws applicable. That the provisions of sections 89-1708 and 89-1801, with reference to the disposition of the proceeds of bonds mentioned therein, and the levy and collection of a special tax or assessment for the payment of the principal and interest of such bonds, and the creation of a sinking fund, and the issuance of warrants for the payment of interest, and the investment of the funds in any sinking fund created, shall apply to the bonds issued hereunder, and all other provisions of chapter 146 of the session laws of Montana of 1909, as amended, with reference to the levy and collection of a special tax and assessment, not inconsistent or in conflict with the provisions of this act,

shall apply to the bonds issued hereunder, the same as to the bonds mentioned therein.

History: En. Sec. 6, Ch. 252, L. 1921;
re-en. Sec. 7231, R. C. M. 1921.

89-1715. (7231.1) Limitation of actions attacking decrees—validation of districts and district acts. No suit, action or proceeding shall be brought in any court in this state attacking the validity or regularity of any order or decree of the court purporting to establish a district hereunder or correcting or amending any order or decree creating a district after the expiration of six months from the date of the recording of the order establishing the district or the order correcting or amending the same. All districts heretofore established by order of the court and having a de facto existence of at least one year, are hereby declared to be valid and legally created subdivisions of the state, and the regularity and validity of the creation of such districts or of the proceedings had for the extension of the boundaries thereof shall not be open to question in any court in this state, and all acts and proceedings of any such district and of its board of commissioners leading up to the authorization, issuance or sale of bonds or the proposed issuance or sale of bonds, are hereby legalized, ratified, confirmed and declared valid to all intents and purposes, and all such bonds whether sold heretofore or hereafter are hereby legalized and declared to be valid and legal obligations of and against the irrigation district so issuing and selling the same, provided, that nothing in this section contained shall be deemed or construed to confirm, approve or validate any warrant issued, or disbursement made, or any contract entered into for the expenditure of money, by the board of commissioners on behalf of any district.

History: En. Sec. 2, Ch. 54, L. 1923.

Constitutionality

This statute and sec. 4024, R. C. M. 1921 (since repealed), curing defects in the creation of irrigation districts, held not open to constitutional objections based on the provisions of sec. 13, art. XV, sec. 27, art. III, sec. 23, art. V, and sec. 1, art. VIII, of the state constitution, or the fourteenth amendment to the constitution of the United States. *State v. Board of County Commrs.*, 86 M 595, 604, 285 P 932; *Judith Basin Land Co. v. Fergus County, Mont.*, 50 F 2d 792.

Operation and Effect

Held, that sec. 4024, R. C. M. 1921 (since repealed), and this section, validating proceedings theretofore had in the creation of irrigation districts, and in the authorization, issuance and sale of bonds by them, cannot be given the effect of curing a want of jurisdiction over a land owner and his lands when his irrigated lands were included without his written consent and without an opportunity to be

heard in opposition to their inclusion, due to failure of notice of the hearing on the petition for the creation of the district. *Scilley v. Red Lodge-Rosebud Irr. Dist.*, 83 M 282, 298, 272 P 543; *Judith Basin Land Co. v. Fergus County, Mont.*, 50 F. 2d 792.

Irregularities in the issuance of irrigation district bonds, such as that the judgment of the district court authorizing and confirming the bonds to be issued and the assessment or tax for their payment was never entered in the minutes of the court, that the meetings of the irrigation commissioners were not held within the confines of the district, although within the county, and that the bonds were sold for less than ninety per cent of their par value, held to have been cured by sec. 4024, R. C. M. 1921 (since repealed), and this section. *State v. Board of County Commrs.*, 86 M 595, 604, 285 P 932.

References

Drake v. Schoregge et al., 85 M 94, 105, 277 P 627; *Toole County Irrigation District v. State*, 104 M 420, 429, 67 P 2d 989.

CHAPTER 18

IRRIGATION DISTRICTS—TAXES AND ASSESSMENTS

Section	89-1801.	Tax or assessment to pay bonds and interest.
	89-1802.	Added lands to pay proportional share of bonded indebtedness.
	89-1803.	All irrigable lands chargeable alike.
	89-1804.	Annual tax levy—apportionment when tracts divided.
	89-1805.	Determination of irrigable area.
	89-1806.	Same.
	89-1807.	Cancellation of assessment for federal projects on amendment of contracts.
	89-1808.	Assessments on federal contracts—district lying partly without state.
	89-1809.	Conclusiveness of tax or assessment.
	89-1810.	Funds for payment of each series of bonds to be kept distinct.
	89-1811.	County treasurer as custodian of district funds.
	89-1812.	Collection of taxes or assessment.
	89-1813.	County commissioners to levy irrigation taxes and assessments, when.
	89-1814.	Transmission of funds from other counties.
	89-1815.	Delinquent sale—redemption.
	89-1816.	Proceeds of sale.
	89-1817.	Debenture certificates—assignment.
	89-1818.	Redemption of lands sold.
	89-1819.	Sale by county commissioners when land not redeemed.
	89-1820.	Proceedings where land struck off to county and not redeemed.
	89-1821.	Duty of county treasurer.
	89-1822.	Purchase by district of lands sold for delinquent taxes and assessments—revolving fund for—credits and expenditures.
	89-1823.	Purchase by district of lands sold at tax sale and tax sale certificates—payment.
	89-1824.	Issuance of tax deed.
	89-1825.	Sale by district of tax deed lands purchased.
	89-1826.	Action to quiet title in district.
	89-1827.	Powers of commissioners to purchase lands sold at tax sales, tax sale certificates, to operate lands—sale of lands—suit—quieting title—general powers.
	89-1828.	Period of redemption—application for tax deed.
	89-1829.	Application of act.
	89-1830.	Partitioning interest in tax deed lands in certain irrigation districts.
	89-1831.	Liability of county treasurers.
	89-1832.	Sale or transfer of lands.

89-1801. (7232) Tax or assessment to pay bonds and interest. (1) All bonds and the interest thereon issued hereunder, and all payments due or to become due to the United States under any contract between the district and the United States, accompanying which bonds of the district have not been deposited with the United States as in section 89-1301 provided, shall be paid by revenue derived from a special tax or assessment levied as herein-after provided upon all the lands included in the district, except upon such lands as have been included in such district on account of the exchange or substitution of water under the provisions of section 89-1611, if any there be; and all the lands in the district at the time said bonds are issued, and all lands subsequently included which are so chargeable under the provisions of this act, shall be and remain liable to be taxed and assessed for the payment of said bonds and interest, and all payments due or to become due to the United States under any contract between the district and the United States, accompanying which bonds of the district have not been deposited with the United States as in section 89-1301 provided.

(2) It shall be the duty of the board of commissioners of the district, in the order or resolution authorizing and directing the issuance of bonds

of the district, mentioned in section 89-1703, to provide for the annual levy and collection of a special tax or assessment upon all the lands included in the district and subject to taxation and assessment as aforesaid, sufficient in amount to meet the interest on said bonds promptly when and as the same accrues, and to discharge the principal thereof at their maturity, or respective maturities, and to meet all payments due or to become due to the United States under any contract between the district and the United States, accompanying which bonds of the district have not been deposited with the United States as in section 89-1301 provided, at the times such payments by such contract become due and payable. Where straight maturity bonds are issued, it shall be the duty of the board of commissioners of the district to create and maintain a sinking-fund sufficient to pay and discharge said bonds at maturity. If said bonds shall be issued for twenty years or less, there shall be annually levied for such sinking-fund a special tax or assessment, as aforesaid, sufficient to produce a net amount represented by the quotient found by dividing the aggregate amount of the principal of the bonds by the number of years the bonds have to run; but if said bonds are issued for more than twenty years, then it shall not be necessary to levy a special tax or assessment for sinking-fund until the twentieth year prior to the maturity of the bonds, at which time and each year thereafter there shall be levied and collected a special tax or assessment sufficient to produce a net sum equal to one-twentieth part of the aggregate amount of the principal of the bonds.

(3) A certified copy of such resolution shall be filed with the clerk of the board of county commissioners of each county in which the lands of the irrigation district lie, and the special tax or assessment therein provided for shall be levied and collected as hereinafter prescribed, and when so collected shall, by the county treasurer having custody of the funds of the district, be placed in a special fund and used solely for the payment of all amounts due or to become due to the United States under any contract between the district and the United States, accompanying which bonds of the district have not been deposited with the United States as in section 18-1301 provided, and for the payment of the interest on and principal of said bonds when due, so long as any of said bonds or the interest coupons thereto appertaining remain outstanding and unpaid.

(4) In the event that for any reason any special tax or assessment hereinabove provided for cannot or shall not be levied and collected in time to meet any interest falling due on any bonds issued hereunder, then the board of commissioners shall have the power and authority, and it shall be their duty, to provide for and pay such interest when due, either out of any of the funds in hand in the treasury of the district not otherwise appropriated, or by warrants (which may bear interest at a rate not to exceed six per centum per annum) drawn against the next district tax or assessment levied or to be levied. Said warrants shall be in addition to those mentioned in section 89-1701.

(5) The board of commissioners shall have power and authority to direct the investment of the funds in any bond sinking-fund aforesaid, in interest-bearing securities, whenever in their judgment the same may be to the best interest of the district. But all such securities shall be converted

into cash in time to meet the principal on the bonds, payable from such sinking-fund promptly at their maturity.

History: En. Sec. 46, Ch. 146, L. 1909; amd. Sec. 14, Ch. 145, L. 1915; re-en. Sec. 7232, R. C. M. 1921.

Cross-Reference

Officer's liability with respect to funds, secs. 59-534, 59-535.

Collection of Taxes

Held, that in the collection of tax or assessment levied by an irrigation district for the payment of the interest on bonds issued by it, the county treasurer is not authorized to seize and sell personal property of a delinquent owner of lands within the district, but must proceed in the manner prescribed by Chapter 199 of the Political Code of 1935 (84-4101 et seq.), for the collection of state and county taxes made a lien upon real property. *State v. Nicholson*, 74 M 346, 350, 240 P 837.

Distribution Pro Rata When Funds Insufficient — When Interest Should Be Retained First

Where the bonds issued by an irrigation district were straight maturity, and not serial, bonds, and the fund out of which they were payable was insufficient to make full payment of them all and could not be replenished by further assessments, the money remaining, held, properly distributed pro rata, irrespective of the fact that other holders had been paid in full; held also, that if the fund is insufficient to pay the principal but there is sufficient to pay the only remaining unpaid coupon

holder, his coupons should be paid first, placing all holders on a parity in that respect. *State ex rel. Central Auxiliary Corp. v. Rorabeck*, 111 M 320, 326, 108 P 2d 601.

Power to Levy Taxes

An irrigation district organized under the laws of this state does exercise some governmental functions; for example, it may levy taxes (this section), which is the exercise of one of the highest prerogatives of sovereignty. *Crow Creek Irr. Dist. v. Crittenden*, 71 M 66, 69, 227 P 63. Authority to issue irrigation bonds implies an authority to levy a tax to pay them. *Judith Basin Irr. Dist. v. Malott*, 73 F. 2d 142.

References

Cosman v. Chestnut Valley Irr. Dist., 74 M 111, 112 et seq., 238 P 879; *Drake v. Schoregge et al.*, 85 M 94, 100, 277 P 627; *State et al. v. Board of Commissioners et al.*, 89 M 37, 80 et seq., 296 P 1; *State ex rel. Malott v. Cascade Co.*, 94 M 394, 398 et seq., 22 P 2d 811; *Judith Basin Irr. Dist. v. Malott*, 73 F. 2d 142; *Toole County Irrigation District v. State*, 104 M 420, 431, 436, 67 P 2d 989.

Waters and Water Courses—231.

67 C.J. Waters § 925 et seq.

30 Am. Jur. 661, Irrigation, §§ 91 et seq.; 48 Am. Jur. 555, Special or Local Assessments.

89-1802. (7233) Added lands to pay proportional share of bonded indebtedness. Where a district is extended after the construction of works of irrigation, including drainage works, to include other irrigable lands, such included lands shall be chargeable with such proportion of the bonded indebtedness incurred or authorized to be incurred by any district, and such proportion of the indebtedness incurred under any contract between the district and the United States, accompanying which bonds of the district have not been deposited with the United States, as in section 89-1301 provided, as the district court shall order, as provided in sections 89-1402 to 89-1408; and the board of commissioners of the district shall provide for the levy of a special tax or assessment against such included lands on account of said bonds and the interest thereon; and on account of any payments under any contracts between the district and the United States, accompanying which bonds of the district have not been deposited with the United States, as in section 89-1301 provided; and said special tax or assessment shall be levied and collected as and in the manner as the special tax assessment against the lands of the original district on account of the payments under any contract between the district and the United States, accompanying which bonds of the district have not been deposited with

the United States, as in section 89-1301 provided, and on account of which said bonds and the interest thereon is provided for, levied, and collected; and upon the extending of any such district, the total of said bond indebtedness, or indebtedness due to the United States, shall be reapportioned, spread, and equalized upon and over the entire area thereof, as provided in section 89-1706.

History: En. Sec. 47, Ch. 146, L. 1909; 9, Ch. 153, L. 1917; amd. Sec. 7, Ch. 116, amd. Sec. 15, Ch. 145, L. 1915; amd. Sec. L. 1919; re-en. Sec. 7233, R. C. M. 1921.

89-1803. (7234) All irrigable lands chargeable alike. All irrigable lands in each irrigation district, except such lands as have been included within such district on account of the exchange or substitution of water, under the provisions of section 89-1611, shall pay at the same rate for all purposes for which said lands are charged; and except that whenever water used for the irrigation of any lands within an irrigation district shall be obtained by pumping to different elevations, the cost of maintenance, operation, and pumping to each separate elevation shall be apportioned and levied upon the lands lying under the ditch or ditches running from that particular elevation, in such manner as may be determined fair and equitable by the board of commissioners after considering the facts in each case. Such apportionment shall be made by the board of commissioners and included each year in the assessment provided for by section 89-1804 of this code as amended.

The amount of such assessment for maintenance, operation, and pumping of water to each separate elevation, whenever there are different elevations, shall be determined by the board of commissioners in such manner, and upon such notice to the persons interested in said district, as said board in its rules and regulations may provide; and provided further, that where contract shall have been made with the United States, the lands within the district, whether originally included or later annexed to the district, shall pay in accordance with the federal reclamation laws and the public notices, orders, and regulations issued thereunder, and in compliance with any contracts made by the United States with the owners of said lands; and in compliance further, with the contract between the districts and the United States; and provided further, that where the works necessary for the completed project shall be constructed progressively, over a period of years, and that where a portion of the lands within the district are or can be irrigated one year or more before the completion of the entire project, then and in that case, such lands, so irrigated or that can be so irrigated through the built portion of the project, shall pay for the cost of operating that portion of the project serving them with irrigation water, and also shall pay such portion of the interest charges as its irrigable area bears to the irrigable area of the entire project; and in case of lands having appurtenant thereto a partial water right or partial rights in a system of irrigation other than that of the districts, the amounts payable shall be equitably apportioned.

History: En. Sec. 48, Ch. 146, L. 1909; amd. Sec. 10, Ch. 153, L. 1917; amd. Sec. 1, Ch. 158, L. 1921; re-en. Sec. 7234, R. C. M. 1921; amd. Sec. 18, Ch. 157, L. 1923; amd. Sec. 1, Ch. 136, L. 1925.

References

Cited or applied as sec. 48, ch. 146, laws of 1909, before amendment, in *O'Neill v. Yellowstone Irr. Dist.*, 44 M 492, 508, 121 P 283; In re Gallatin Irrigation Dis-

trict, 48 M 605, 612, 140 P 92; State et al. 30 Am. Jur. 662, Irrigation, § 92.
v. Board of Commissioners et al., 89 M 37,
91, 296 P 1.

89-1804. (7235) Annual tax levy—apportionment when tracts divided.

(1) On or before the second Monday in July each year the board of commissioners of each irrigation district organized hereunder shall ascertain the total amount required to be raised in that year for the general administrative expenses of the district, including the cost of maintenance and repairs, and the total amount to be raised that year for interest on and principal of the outstanding bonded or other indebtedness of the district, including any indebtedness incurred under any contract between the district and the United States accompanying which bonds of the district have not been deposited with the United States as in section 89-1301 provided, and shall levy against each forty-acre tract or fractional lot as designated by the United States public survey, or platted lot, if land is subdivided in lots and blocks (or where land shall be owned in less than forty-acre tracts or in less than the platted lot, then against each such tract) of land in the district, that portion of the said respective total amounts so to be raised which the total irrigable area of any such tract bears to the total irrigable area of the lands in the district, so that each acre of irrigable land in the district shall be assessed and required to pay the same amount as every other acre of irrigable land therein, unless otherwise specifically provided.

(2) In the event that the ownership of any such forty-acre tract, or other subdivision of land in the district, shall be divided after a special tax or assessment against the same has been levied, each or either of the owners of such tract or subdivisions shall be entitled to have such special tax or assessment equitably apportioned to and against said divisions of such tract or subdivisions, so that each owner shall be enabled to pay such special tax or assessment against his portion of such tract or subdivision, and have the same discharged from the lien thereof.

(3) Not more than four dollars per acre, against each irrigable acre of land in the district, shall be levied in any one year on account of administrative expenses and cost of maintenance and repairs, but this provision shall not invalidate any warrant lawfully issued or to be issued; provided, however, that this limitation shall not apply to any district supplying water by means of any system other than a gravity system.

(4) Whenever the board of commissioners has provided for the payment of any indebtedness of the district by levy of a special tax or assessment, and thereafter makes provision for the payment of said indebtedness by the issuance of bonds, said board may cancel any portion or all of said levy theretofore made to raise funds to pay said indebtedness; and whenever said board has provided for the payment of any indebtedness of the district by the authorization of bonds and the levy of a special tax or assessment to pay the principal of and interest on said bonds, and thereafter cancels said issue of bonds as provided for in section 89-1707 said board may cancel any portion or all of said levy theretofore made to raise funds to pay the principal of or interest on said bonds so cancelled, and refund to the respective persons paying the same the funds, if any, in the custody of the county treasurer collected for the purpose of meeting the principal of and interest on such bonds so cancelled.

(5) Any land or lands which may for any reason have escaped assessment in any previous year or years may be assessed or listed for the omitted years and omitted charges, in any subsequent year at the time of the making of the assessment in and for such subsequent year, but no such assessment shall be made later than three years after the occurrence of such omission.

History: En. Sec. 49, Ch. 146, L. 1909; amd. Sec. 16, Ch. 145, L. 1915; amd. Sec. 1, Ch. 148, L. 1921; re-en. Sec. 7235, R. C. M. 1921; amd. Sec. 19, Ch. 157, L. 1923.

Apportionment of Assessments

Held, that the apportionment of assessments for administrative expenses, maintenance, repairs, etc., of an irrigation district on the basis of the irrigable area in each tract of land of forty acres or less, prescribed by this section, is neither unreasonable nor arbitrary, in view of the fact that that method has had the benefit of long experience in other states and the consensus of opinion is that no fairer method has been devised. *Walden v. Bitter Root Irr. Dist.*, 68 M 281, 290, 291, 217 P 646.

Authority to Tax

Held, as to the contention that if property of irrigation districts is exempt from taxation, they are without power to raise

or expend money for the payment of taxes, that provision made by this section, for the raising of revenue for the maintenance and operation of such districts is sufficiently broad to enable them to meet exactions of the taxing power of the state. *Buffalo Rapids Irr. Dist. v. Collieran*, 85 M 466, 480, 279 P 369.

Ordinary Running Expenses

Ordinary overhead or running expenses of a district are to be met by an annual levy of taxes. In re *Gallatin Irrigation District*, 48 M 605, 612, 140 P 92.

References

Drake v. Schoregge et al., 85 M 94, 103, 277 P 627; *State ex rel. Malott v. Cascade Co.*, 94 M 394, 414, 22 P 2d 811; *Toole County Irrigation District v. State*, 104 M 420, 431, 67 P 2d 989; *State ex rel. DeKalb v. Ferrell*, 105 M 218, 221, 70 P 2d 290.

89-1805. (7235.1) Determination of irrigable area. (1) For the purpose of determining the number of acres of irrigable lands in each forty-acre tract or fractional lot as designated by the United States public survey, or platted lot, if land is subdivided in lots and blocks (or where land shall be owned in less than forty-acre tracts or in less than the platted lot, then against each such tract) of land in the district, the board of commissioners of any irrigation district organized hereunder, whenever deemed advisable and at any time except as otherwise provided, may cause a careful topographical survey and map of said lands to be made, as well as a specific examination of the character of the soil of each such tract. Upon completion of such survey and maps, and examination, the board shall give notice that at a meeting of said board, to be held at the office of the board on a day to be fixed in said notice, said board will determine the irrigable area of each such tract of land in the district and that it will hear and consider any objection on the part of any land owner in the district to such determination and to adjustment of the irrigable area of said district or of any lands within any tract or subdivision thereof. It shall not be necessary to describe said tracts in said notice. Such notice shall be given by publication, once a week for two successive calendar weeks, in a newspaper of general circulation in the county where the office of the board is located, and where lands of any irrigation district lie in more than one county, such notice shall also be published in a newspaper or newspapers of general circulation in each such county. The last publication of said notice shall be at least five days prior to the date fixed for said meeting.

(2) At such meeting, the board shall proceed to determine and fix the number of acres in each tract or subdivision irrigable from the works or

proposed works of the district, and shall hear all persons interested who may appear, and shall continue in session from day to day (exclusive of Sundays and legal holidays) as long as may be necessary and until said determination of irrigable area shall have been completed. The board shall hear all evidence offered, including maps and surveys caused to be prepared by it as well as maps and surveys prepared by any owner of lands. Upon such determination, the irrigable area so fixed shall become, and thereafter be, the acreage upon which any special tax or assessment shall be levied, and each irrigable acre shall pay at the same rate as every other acre of irrigable land in said district shall pay; and any special tax or assessment levied for any purpose shall be a lien upon the entire forty-acre tract or fractional lot as designated by the United States public survey, or platted lot, if land is subdivided in lots and blocks (or where land shall be owned in less than forty-acre tracts or in less than the platted lot, then against each such tract) of land in the district of which said irrigable area forms a part, and said lien shall attach to said entire tract as of the first Monday of March in the year in which said special tax or assessment is levied.

(3) Upon completing such determination, the board shall fix, by appropriate resolution or order, the total acreage and the irrigable acreage of each such tract or subdivision, and shall cause to be prepared a list of all lands in said district, which list shall contain an accurate description of each such forty-acre tract or fractional lot as designated by the United States public survey, or platted lot, if land is subdivided in lots and blocks (or where land shall be owned in less than forty-acre tracts or in less than the platted lot, then against each such tract) of land in said district, the total acreage and the number of irrigable acres therein as so fixed and determined, and the name of the owner, or holder of title or evidence of title thereof, ascertained as provided in section 89-1201. Such list, when completed and adopted, shall be filed in the office of the board of commissioners and shall remain there for public inspection. A certified copy of such resolution and list shall be filed with the county clerk and recorder of each county in which any portion of the lands in said district are situated; provided, however, there shall be omitted from such copy lands not situated in the county in which such copy is filed.

(4) No special tax or assessment shall be levied against any forty-acre tract, or fractional lot as designated by the United States public survey, or platted lot, if land is subdivided in lots and blocks (or where lands shall be owned in less than forty-acre tracts or in less than the platted lot, then against each such tract) found by said board to contain no irrigable land; nor shall any lien created after the order of determination herein provided for attach to any such tract, nor shall the owner, or owners, of any tract or tracts have any vote or votes in any proceeding or election under the provisions of Chapter 146 of the Laws of 1909, or any amendment thereof, or act supplementary thereto, after the making of such order, unless his said land, or a portion thereof, be found by said board to contain an area irrigable from the works, or proposed works, of said district.

(5) Upon the determination provided for in this section, the board of commissioners shall have the power to refund any taxes paid, or cancel any

unpaid taxes or assessments, levied upon an acreage in excess of that so fixed by said order of determination, and where necessary, may issue warrants therefor.

(6) Within sixty days after such resolution adopting said list, the board of commissioners may petition the district court for confirmation of their acts in determining the irrigable area, as aforesaid, and in refunding or cancelling any taxes or assessments. The majority in number and acreage of the holders of title or evidence of title to lands in said district, ascertained as in this act provided, may, likewise, within such sixty-day period, petition the district court for review of the actions of the board of commissioners. But one of such proceedings, if prosecuted to determination, shall be exclusive of the other. Upon such proceeding, the court may order any assessment of taxes upon any land or lands to be reduced or raised according to the irrigable area as found by the court, or taxes previously levied upon any area shown to be excessive, to be refunded or cancelled.

(7) The provisions of section 89-1402, regarding the procedure as well as the right and time to appeal, shall apply to any proceeding instituted in pursuance of the provisions of this section; provided, however, that nothing in this section shall be deemed or construed to affect or impair the lien of any bonds issued by the district; and provided, further, that if confirmation proceedings are held and a certified copy of the order of confirmation be filed with the county clerk and recorder of the county in which any portion of said lands is situated, it shall not be necessary to file in said office the certified copy of the resolution and order of the board, or of the list, hereinabove provided for.

(8) Provided, however, that where districts have been established in order to co-operate with the United States under the federal reclamation laws heretofore or hereafter enacted, or under any act of congress, which shall permit of the performance by the United States of work in this state, for the purposes of construction of irrigation works, including drainage works, or for purchase, extension, operation, or maintenance of construction works, or for the assumption as principal or guarantor, of indebtedness to the United States on account of district laws, the determination of the irrigable area of the lands in said district may be made by the said board of commissioners in the manner in this section provided or by the United States at the option of the latter, and, if the United States determines the irrigable area, the proceeding for the apportionment and distribution of the costs of the proposed works or improvements, hereinafter provided for in section 89-1806 shall not be had.

History: En. Sec. 20, Ch. 157, L. 1923.

Operation and Effect

This section providing that no special assessment shall be levied for irrigation district purposes against any forty-acre tract found by the board of commissioners not to contain any irrigable land, etc.,

held to apply only to bonds issued after the irrigable area of the district shall have been determined and therefore does not have reference to bonded obligations incurred prior to the order excluding non-irrigable lands from the district as organized. *Drake v. Schoregge et al.*, 85 M 94, 277 P 627.

89-1806. (7235.2) Same. (1) Whenever a petition for the issuance of bonds of any irrigation district organized hereunder shall have been filed, as hereinbefore in section 89-1703 provided, the board of commissioners

of such district shall examine, or cause to be examined, each forty-acre tract or fractional lot as designated by the United States public survey, or platted lot, if land is subdivided in lots and blocks (or where land shall be owned in less than forty-acre tracts or in less than the platted lot, then against each such tract) of land in said district, and cause a careful topographical survey and map to be made, in the manner provided for in section 89-1805. Upon such examination, the board shall determine the number of irrigable acres in each such tract; and shall apportion and distribute the cost of the works or improvements for which said bonds are to be issued, over the tracts within said district according to the irrigable area in each of said tracts or subdivisions, so that each such irrigable acre shall be required to bear the same burden of such costs as each other irrigable acre in said district, and the special tax or assessment levied to meet the principal of and interest on said bonds so authorized, shall become a lien upon the entire tract of which such irrigable area forms a part or portion as of the first Monday in March of the year in which such special tax or assessment is levied, and the number of irrigable acres in each such tract as so determined shall not be diminished but may be increased during the term for which any such bonds may be issued or until the bonds shall be liquidated in full.

(2) Provided, however, that if a proceeding for the determination, in whole or in part, of the irrigable area of the lands in said district has already been had, or a topographical survey or maps thereof prepared, or a court confirmation of said prior proceedings had, in part or in full, the said board may, in its discretion, adopt all or such portions of said prior proceedings; and in such an event, it shall not be necessary to cause an additional survey, or maps, or examination, of any of such tracts to be again made, or to re-determine the irrigable area of any such tract.

(3) The board shall make such determination after hearing had and shall fix the total acreage and the irrigable acreage, and shall cause a list of such irrigable area to be made and filed and the proceedings of the board in connection with such determination, including said hearing and notice of said hearing, and order or resolution fixing the irrigable area and the preparation and filing of said list, shall conform to the requirements set forth in section 89-1805. At such hearing, the said board shall also determine the amount and rate per acre necessary to be levied against each irrigable acre in the district to meet the interest on and principal of said authorized bond issue, and any tax levied for such purposes shall be a lien upon the entire tract of which said irrigable area forms a part. If any land owner in the district shall appear before the board at said time and pay in cash the amount fixed against his said land as its proportion of the amount found necessary for the purposes for which said bonds were authorized and are to be issued, his land shall be excluded from the lien of the bond issue and the amount of bonds intended to be issued shall be reduced by the amount of such payment. Any person interested who shall fail to appear before the board at said meeting shall not thereafter be permitted to contest the proceedings of said board, or any part thereof, except upon special application to the court in the proceedings for the

confirmation of said bonds and a showing of reasonable excuse for failure to appear before said board of commissioners.

(4) In case any such land owner makes objection to the proceedings of said board in determining the irrigable area in his own or any other tract of land, or the amount or rate per acre of the special tax and assessment to be levied against each irrigable acre in the district for the purposes of the proposed bond issue, and said objection is overruled by the board, such objection without further proceedings shall be regarded as appealed to the district court, and shall, with the other proceedings of said board at said meeting, be heard at the proceedings to confirm said bonds, as provided in section 89-1704, and when so confirmed, said order overruling such objection and confirming the order of the board determining the irrigable area of each tract of land and apportioning the cost of the improvement thereto, shall become final, binding and conclusive upon said land owner and upon the district, unless appealed from as in said section 89-1704 provided.

(5) Provided, however, that whenever the irrigable area of the lands in any irrigation district shall have been determined and confirmed, no owner or holder of title or evidence of title to lands in said district, during the period of any bonds thereafter authorized shall be issued and outstanding, shall have the taxable acreage of his said lands fixed or adjudicated in the manner provided by sections 89-1404 to 89-1408, in such manner or to such extent as to reduce the acreage subject to the payment of such bonds or interest thereon, or in such manner as to affect the security of such bonds or interest thereon.

History: En. Sec. 20, Ch. 157, L. 1923.

References

Drake v. Schoregge et al., 85 M 94, 101, 277 P 627.

89-1807. (7235.3) Cancellation of assessment for federal projects on amendment of contracts. In any case where the board of commissioners of any irrigation district has made a levy or assessment under the provisions of section 89-1804 and included therein any amount due the United States under any contract or agreement for the purchase of any irrigation works or for the operation and maintenance of any irrigation works, or while acting as fiscal agent for the United States or under any authorization of the district by the United States to make collections of moneys for or on behalf of the United States in connection with any Federal Reclamation Project, as provided in section 89-1301, and the United States shall thereafter, modify or supplement such contract or agreement so as to eliminate certain charges under said contract or agreement, or so as to make such charges due at a later date or dates than originally provided in said contract or agreement, said board of commissioners are empowered to direct the cancellation of said levy or assessment theretofore made to raise funds to pay the United States that are under such modification or supplemental contract or agreement made due and payable at a later date or dates.

History: En. Sec. 1, Ch. 103, L. 1923.

89-1808. (7236) Assessments on federal contracts—district lying partly without state. Where a contract has been entered into or may be hereafter

entered into between an irrigation district and the United States the board of commissioners shall have the power to levy assessments against all of the land within the district for any and all of the purposes hereinbefore enumerated, and, in addition thereto, the power to levy assessments against any or all of the lands in said district in compliance with such contract; provided further, that where irrigation works lie partly in the state of Montana and partly in an adjacent state, the board of commissioners may contract with the district or districts in the adjacent state for the mutual construction of works, operation and maintenance of work, drainage and other matters, and things pertaining to said works, and shall have the power to levy assessments against any or all lands within the district necessary to carry out the provisions of such contract.

History: En. Sec. 1, Ch. 4, Ex. L. 1921;
re-en. 7236, R. C. M. 1921; amd. Sec. 2,
Ch. 103, L. 1923.

89-1809. (7237) Conclusiveness of tax or assessment. In determining the proper and just tax or assessment to be levied against any land for district purposes, the finding of the board of commissioners of the district, in the absence of fraud or mistake, shall be conclusive and final, except as herein otherwise provided.

History: En. Sec. 50, Ch. 146, L. 1909;
re-en. Sec. 7237, R. C. M. 1921.

89-1810. (7238) Funds for payment of each series of bonds to be kept distinct. When more than one series of bonds shall have been issued by a district, the funds for the payment of each series shall be kept separate and distinct, and when contract is made between the district and the United States, accompanying which bonds of the district have not been deposited with the United States, as in section 89-1301 provided, the funds for the payment to be made under any such contract shall be kept separate and distinct.

History: En. Sec. 52, Ch. 146, L. 1909;
amd. Sec. 17, Ch. 145, L. 1915; re-en. Sec.
7238, R. C. M. 1921.

89-1811. (7239) County treasurer as custodian of district funds. The county treasurer of the county wherein the office of an irrigation district is located shall be the custodian of all funds belonging to the district, and he shall pay out such funds upon the order of the board of commissioners, except as to payments on bonds and interest, and payments under any contract between the district and the United States, accompanying which bonds of the district have not been deposited with the United States, as in section 89-1301 provided, for which no order shall be necessary; such orders shall be signed by the president and secretary of the board, and shall bear the official seal of the district. Where such orders are for the payment of money for construction work, the same shall be accompanied by and attached to the written estimate of the engineer in charge of such construction work.

History: En. Sec. 53, Ch. 146, L. 1909;
amd. Sec. 18, Ch. 145, L. 1915; re-en. Sec.
7239, R. C. M. 1921.

County Debtor of District

When funds of an irrigation district are deposited with the county treasurer

they become county funds for which the district has a credit on the books of the treasurer, i.e., the relation of debtor and creditor is created between the county and the district. State ex rel. Blenkner v. Stillwater County, 104 M 387, 392, 66 P 2d 788.

References

Crow Creek Irr. Dist. v. Crittenden, 71 M 66, 71, 227 P 63; State v. McGraw, 74 M 164, 165, 240 P 817; State ex rel. DeKalb v. Ferrell, 105 M 218, 221, 70 P 2d 290.

Waters and Water Courses \S 227, 230(6).
67 C.J. Waters \S 892 et seq., 910 et seq.

89-1812. (7240) Collection of taxes or assessment. On or before the third Monday in August of each year the board of commissioners shall furnish the county assessor in each county in which any of the lands of the district are situate, a correct list of all the district lands in such county, together with the amount of the total taxes or assessments against said lands for district purposes. The county assessor of each county shall immediately thereafter cause said assessment roll to be entered in the assessment book of said county for each year, and prior to the delivery of the assessment book to the county treasurer. The county treasurer of each county shall collect such taxes or assessments in the same manner and at the same time as county and state taxes.

History: En. Sec. 54, Ch. 146, L. 1909; amd. Sec. 2, Ch. 96, L. 1919; re-en. Sec. 7240, R. C. M. 1921; amd. Sec. 1, Ch. 14, L. 1945.

rel. Malott v. Cascade Co., 94 M 394, 413, 22 P 2d 811; State ex rel. Freeborn v. Yellowstone County, 108 M 21, 28, 88 P 2d 6.

References

Crow Creek Irr. Dist. v. Crittenden, 71 M 66, 71, 227 P 63; State v. McGraw, 74 M 164, 165, 240 P 817; State v. Nicholson, 74 M 346, 351, 240 P 837; State ex

Waters and Water Courses \S 231.

67 C.J. Waters \S 925 et seq.

48 Am. Jur. 555, Special or Local Assessments.

89-1813. (7240.1) County commissioners to levy irrigation taxes and assessments, when. If for any reason a levy of taxes or assessments shall not be made for any irrigation district in any year by board of commissioners of such district within the time provided by section 89-1804 the board of county commissioners of the county in which such district is situated shall not later than the second Monday in August ascertain the total amount to be raised for all purposes of said district, make levy which should have been made by board of commissioners of such district, and furnish the county clerk of such county with a list of the lands and the amount of taxes or assessments as provided in section 89-1812, and such levy so made shall have the same force and effect as though made by board of commissioners of such district. Provided, however, that this act shall apply only to irrigation districts having a bonded indebtedness and actually in possession of a dependable water supply system, and furnishing substantial amounts of water to bona fide users.

History: En. Sec. 1, Ch. 89, L. 1931.

M 394, 414, 22 P 2d 811; State ex rel. Blenkner v. Stillwater County, 104 M 387, 394, 66 P 2d 788.

References

State ex rel. Malott v. Cascade Co., 94

89-1814. (7241) Transmission of funds from other counties. Where the lands of any district lie in more than one county, the district taxes or assessments collected in counties containing less than a majority of the lands shall be transmitted, on or before the first day of January of each year, by

the county treasurer of such county to the county treasurer of the county wherein the office of the district is located.

History: En. Sec. 55, Ch. 146, L. 1909;
re-en. Sec. 7241, R. C. M. 1921.

89-1815. (7242) Delinquent sale—redemption. Delinquent sales of land for unpaid taxes or assessments shall be made in the same manner as for state and county taxes in the respective counties where such lands are situated, and the right of redemption shall in all cases be made the same as in cases where lands are sold for state or county taxes.

History: En. Sec. 56, Ch. 146, L. 1909;
amd. Sec. 2, Ch. 127, L. 1913; re-en. Sec.
7242, R. C. M. 1921.

References

State ex rel. Malott v. Cascade Co., 94
M 394, 399, 22 P 2d 811.

NOTE.—See in connection with this section the provisions of section 89-1828.

89-1816. (7243) Proceeds of sale. Whenever, pursuant to the provisions of the preceding section, any lot, tract, piece, or parcel of land included within and forming a part of any irrigation district created under the provisions of this chapter, or included within any extension of such district, shall be sold by the treasurer of the county wherein such land is situated, in the manner provided by law for the sale of lands for delinquent taxes for state and county purposes, and taxes or assessments of such irrigation district form all or a part of the taxes for which such lands are sold, it shall be the duty of the county treasurer making such sale or sales to place to the credit of the proper funds of such irrigation district, out of the proceeds of such sale or sales, the total tax or assessment of such irrigation district, inclusive of the interest and penalty thereon as provided for by the general laws relating to delinquent taxes for state and county purposes, and whenever any such lands are struck off at such sale to the county wherein the same are situate, pursuant to the provisions of section 84-4124, the county treasurer of such county must, upon the issuance of the certificate of tax sale to said county, issue to said irrigation district, and in its corporate name, a debenture certificate for the amount of taxes and assessments due to said irrigation district from said lands and premises so sold, inclusive of the interest and penalty thereon, which certificate shall be evidence of and conclusive of the interest and claim of said irrigation district in, to, against, and upon the lands and premises so struck off to said county at such tax sale, and from and after the issuance of said certificate, the sum named therein and the taxes and assessments of said district evidenced thereby shall bear interest at the rate of one per centum per month from the date of said certificate until redeemed in the manner provided for by law for the redemption of the lands sold for delinquent state and county taxes; or until paid from the proceeds of the sale of the lands and premises described therein, in manner provided for by section 2235 of these codes, and duplicates of such certificates so issued to said irrigation district shall be filed in the office of the county clerk and county treasurer of said county with the certificate of tax sale of said lands and premises.

History: En. Sec. 2, Ch. 127, L. 1913;
re-en. Sec. 7243, R. C. M. 1921.

NOTE.—Section 2235 referred to above was repealed by Sec. 10, Ch. 171, L. 1941. See sections 84-4190 to 84-4197.

References

State et al. v. Board of Commissioners
et al., 89 M 37, 60, 296 P 1; State ex rel.

Malott v. Cascade Co., 94 M 394, 399 et
seq., 22 P 2d 811.

89-1817. (7244) Debenture certificates—assignment. The certificates provided for by the preceding section hereof shall be assignable, and may be sold or negotiated by the board of commissioners of said irrigation district and the proceeds thereof delivered to and deposited with the county treasurer of said county for proper credit to the respective funds of said irrigation district, and upon the sale, negotiation, or transfer thereof, as above provided for, the lien of said irrigation district shall vest in the purchaser thereof, and is only divested by the payment to the purchaser or the county treasurer of said county, for his use, of the sum for which said certificate is issued and one per cent. additional for each month that elapses from the date of such certificate until redeemed as hereinafter provided for.

History: En. Sec. 2, Ch. 127, L. 1913;
re-en. Sec. 7244, R. C. M. 1921.

et al., 89 M 37, 94, 296 P 1; State ex rel.
Malott v. Cascade Co., 94 M 394, 400 et
seq., 22 P 2d 811.

References

State et al. v. Board of Commissioners

89-1818. (7245) Redemption of lands sold. Upon the redemption of any lands so sold for taxes in the manner provided for by section 84-4132, the county treasurer of said county, out of the redemption money, shall pay to the holder or holders of such certificate or certificates the sums for which the same were issued, with interest as therein provided to the date of the redemption of said lands.

History: En. Sec. 2, Ch. 127, L. 1913;
re-en. Sec. 7245, R. C. M. 1921.

gation District, 48 M 605, 610, 140 P 92;
State ex rel. Malott v. Cascade Co., 94
M 394, 401 et seq., 22 P 2d 811.

References

Cited or applied in In re Gallatin Irri-

89-1819. (7246) Sale by county commissioners when land not redeemed. When the lands and premises so sold for taxes, and upon and against which the certificates herein provided for have been issued for the taxes and assessments of such irrigation district, are not redeemed within the time provided for by section 84-4132, it shall be the duty of the board of county commissioners of said county, within three months thereafter, to cause said lands and premises to be sold as provided for by section 2235 of these codes, and out of the proceeds of the sale thereof the county treasurer of said county shall pay to the holder or holders of such certificates the sum or sums for which the same were issued, with interest as therein provided for to the date of said sale of said lands by the board of county commissioners, and no lands and premises so held by any county, and against which the certificates provided for by this chapter have been issued, shall, upon such sale, be struck off or sold for a less sum than the amount of taxes and assessments of said irrigation district represented by said certificates, inclusive of the interest thereon, in addition to the state and county taxes, if any, against the same.

History: En. Sec. 2, Ch. 127, L. 1913;
re-en. Sec. 7246, R. C. M. 1921.

NOTE.—Section 2235 referred to above
was repealed by Sec. 10, Ch. 171, L. 1941.
See sections 84-4190 to 84-4197.

References

State v. Board of County Commrs., 86 M 595, 600, 285 P 932; State et al. v. Board of Commissioners et al., 89 M 37, 60, 296 P 1; State ex rel. Malott v. Cascade Co., 94 M 394, 401 et seq., 22 P 2d 811.

89-1820. (7247) Proceedings where land struck off to county and not redeemed. In case the property so assessed for irrigation district purposes is struck off to the county, as provided for by law, and certificates of the taxes and assessments of said irrigation district, issued thereon as hereinbefore provided for, and the said lands and premises be not redeemed before the next annual assessment for irrigation purposes shall become delinquent thereon, then and in that event, whether said lands and premises be again sold by the county treasurer of said county, or the sale thereof adjourned as provided for by sections 84-4186 and 84-4187, like certificates for each year's irrigation district taxes and assessments shall be issued against said land, and shall be included in and satisfied by any redemption thereof, with interest as hereinbefore provided for, and shall in like manner be paid from the proceeds of sale of said lands by the board of county commissioners, if the same be not redeemed as provided for by law.

History: En. Sec. 2, Ch. 127, L. 1913;
re-en. Sec. 7247, R. C. M. 1921.

89-1821. (7248) Duty of county treasurer. In all cases where lands and premises included within and forming a part of any irrigation district, formed under this chapter, shall have heretofore been sold for delinquent taxes in the manner provided for by law, and the same have been struck off to the county in which said lands are located, the treasurer of said county shall, within thirty days after the passage and approval of this act, issue to said irrigation district like certificates for taxes and assessments of said irrigation district, included within and forming a part of the total tax for which said lands and premises were so struck off and sold to such county, and for all taxes and assessments of said irrigation district, levied and assessed against said lands and premises subsequent to the first sale thereof, which then remain delinquent, and file like duplicates thereof, in manner and form as hereinbefore provided for, and all of the preceding provisions of this act shall apply with like force and effect to such certificates.

History: En. Sec. 2, Ch. 127, L. 1913;
re-en. Sec. 7248, R. C. M. 1921.

89-1822. (7248.1) Purchase by district of lands sold for delinquent taxes and assessments—revolving fund for—credits and expenditures. (1) At all sales of all lands for delinquent taxes where all, or a portion, of such delinquent taxes are taxes and assessments levied and assessed by any irrigation district against the lands to be sold, the commissioners of such irrigation district, if there be no other bidder for such land at such tax sale, may bid therefor the total amount of all delinquent taxes and assessments, penalty and interest against such land, and thereupon the county treasurer shall strike off said lands to such irrigation district and issue certificate of tax sale to said irrigation district the same as such certificates of tax sales are issued to other purchasers. For the purpose of paying such taxes, assessments, interest and penalties, the commissioners of such irrigation district shall have the power and authority to create by resolution a fund to be

known and designated as the revolving fund for the purchase of tax certificates and titles, and to provide funds for such revolving fund by levy, bond issue or otherwise, and the district may pay such taxes, assessments, interest and penalties by issuing a warrant to the county treasurer against such fund, provided that there shall be sufficient money in such fund to pay same in full upon demand.

(2) When taxes are paid by the district as in this act provided, the county treasurer shall distribute that portion of said tax belonging to the irrigation district, to the several funds as designated in the tax levy and assessment; provided, however, if the board of commissioners of the irrigation district shall file with the county treasurer a certified copy of resolution passed by such commissioners requesting non-distribution by the county treasurer of the portion of the tax belonging to the district, the county treasurer shall not distribute that portion of said tax belonging to the irrigation district to the several funds as designated in the tax levy and assessment but the total amount due the irrigation district shall be credited by him to the revolving fund above specified and in such event at the time of the sale by the district of the tax sale certificate or of the property obtained through such certificate such funds as are realized from such sale must be deposited with the county treasurer together with the rentals received from the property and he shall credit the proceeds of such redemption sale or rental pro rata to the several funds of the district in accordance with the original levy or assessment.

(3) At the time of redemption or of the sale by the district of the tax sale certificate or of the property obtained through such certificate, such funds as are realized must be deposited with the county treasurer together with rentals received from the property, and he shall credit the proceeds of such redemption, sale or rentals to the revolving fund above specified, to such extent as may be required, with the credit provided for above, to reimburse said revolving fund in full, if the sum realized permit, the overplus, if any, to be credited to the several funds of the district in accordance with the original levy and assessment. No expenditures shall be made from the revolving fund except for the purpose as herein specified, and when, by resolution of the board of irrigation district commissioners, such fund shall be deemed inactive, the balance remaining in said fund shall be transferred to a sinking fund to be applied upon any indebtedness which may have been incurred by the district by reason of the creation of such revolving fund, if any there may be.

History: En. Sec. 1, Ch. 89, L. 1925;
amd. Sec. 1, Ch. 57, L. 1929.

References

State ex rel. Malott v. Cascade Co., 94
M 394, 405, 22 P 2d 811.

89-1823. (7248.2) Purchase by district of lands sold at tax sale and tax sale certificates—payment. Any irrigation district may purchase the certificate of tax sale issued to any county for lands sold at tax sale against which any of its taxes and assessments are delinquent or, if deed therefor has issued to the county, may purchase such lands from the county by paying to the county treasurer of the county making the sale all state, county, city, school district, and other delinquent taxes together with penalty, interest and costs of publication and sale. Such payment shall be made by the

commissioners of such district issuing and delivering to the county treasurer, a warrant drawn against the revolving fund of said district, provided there shall be sufficient money in said fund to pay same in full upon demand, and thereupon, such treasurer shall assign such certificate of tax sale to such irrigation district as in the case of the purchase thereof by any other person, or the commissioners of the county shall convey such lands to said district in case tax deed therefor has been issued to the county.

History: En. Sec. 2, Ch. 89, L. 1925.

89-1824. (7248.3) Issuance of tax deed. When there has been no redemption of the lands so sold at tax sale to an irrigation district or any other person or of the lands struck off to the county for which certificate of sale has been assigned to an irrigation district, or any other person in the manner and within the time hereinafter allowed by this act for the redemption of lands from such tax sales, the county treasurer of the county within which such lands are situated, shall issue tax deed therefor to such irrigation district, or other holder of certificate of sale.

History: En. Sec. 3, Ch. 89, L. 1925.

Waters and Water Courses 237.
67 C.J. Waters § 925 et seq.

89-1825. (7248.4) Sale by district of tax deed lands purchased. After the issuance of any such tax deeds to an irrigation district, the commissioner of such district shall have power to sell and convey the lands so purchased, or any part thereof, at either public or private sale whether the price received therefor equals the amount of delinquent taxes, assessments, penalties, interest and costs against said lands or not; provided that if such lands be offered for sale at public sale that such commissioners may reject any and all bids thereon, and provided further that no such lands shall be sold by said commissioners at private sale until the same shall have been offered for sale at public sale, and that no such lands shall be sold at private sale at a price less than the highest price bid therefor at the public sale at which such lands are offered; and provided further that if no bid is received for such lands when the same are offered for sale at public sale the said commissioners may then sell the same in such manner and for such price as in their judgment they shall deem to be for the best interests of said district.

History: En. Sec. 4, Ch. 89, L. 1925.

89-1826. (7248.5) Action to quiet title in district. If any such lands are conveyed to any irrigation district, it may maintain an action to quiet title to said lands in said district in the manner provided by the laws of Montana for quieting title to real property.

History: En. Sec. 5, Ch. 89, L. 1925.

89-1827. (7248.6) Powers of commissioners to purchase lands sold at tax sales, tax sale certificates, to operate lands—sale of lands—suit—quieting title—general powers. In addition to the powers heretofore granted to irrigation districts, the commissioners of every irrigation district established and organized under and by virtue of the laws of the state of Montana shall have power to purchase lands within their respective districts heretofore sold and conveyed to the county for non-payment of taxes and assessments;

to purchase certificates of tax sales of such land when struck off to the county; to take title thereto for their district; to own, manage, operate, lease, sell and dispose of the same for the use and benefit of their respective districts upon such terms as shall in the judgment of the board of commissioners of such irrigation district be deemed most advantageous to the district; provided that such lands shall be first offered for sale at public sale and the said commissioners may reject any and all bids thereon, if in their judgment such bids are insufficient; and provided further that no such lands shall be sold at private sale at a price less than the highest bid therefor at the public sale at which such lands are offered for sale; and provided if no bid is received for said land when said land is offered at public sale the commissioners may then sell the same in such manner and at such price and upon such terms as in their judgment shall be for the best interests of said district, and the said commissioners of every irrigation district shall have power to sue and be sued in reference to said lands in the name of their respective irrigation districts; to commence, maintain and prosecute suits to quiet title to said lands and any and all other suits in equity or actions at law with reference thereto the same as might be done by any other individual or corporate owners of such lands; and to do any and all other acts or things necessary or beneficial for their respective districts in connection with such lands. The board of commissioners of any irrigation district shall be, and they are hereby authorized and empowered to do any and all things necessary to carry out the provisions and intentions of this act.

History: En. Sec. 6, Ch. 89, L. 1925;
amd. Sec. 1, Ch. 36, L. 1933.

89-1828. (7248.7) Period of redemption—application for tax deed. The holder of such certificate of tax sale of such land, whether said holder be an irrigation district or individual, may, at any time after the expiration of two years from the date of sale of said property for delinquency, if same has not been redeemed within said period of two years from date of sale of said lands for delinquency, apply to the county treasurer, as provided by law for the issuance of a tax deed to said property, and upon such application, the county treasurer shall issue such tax deed, in the manner and form provided by law, to said holder.

History: En. Sec. 7, Ch. 89, L. 1925.

89-1829. (7248.8) Application of act. This act shall apply only when or after said irrigation district shall have commenced delivery of water to any lands included in such irrigation district.

History: En. Sec. 8, Ch. 89, L. 1925.

89-1830. Partitioning interest in tax deed lands in certain irrigation districts. In any case where an irrigation district, established under the law of this state, has incurred a bonded indebtedness or other indebtedness; but has not constructed or purchased any irrigation plant or system for the irrigation of land in the district, and, more than ten (10) years have expired since the date of the creation of the irrigation district, the board of commissioners of such irrigation district and also the board of county commissioners of the county in which the lands of the district or any part thereof

are situated, shall have power to enter into an agreement, on behalf of such irrigation district and such county, for the partitioning of the respective interests of the irrigation district and the county in lands to which the county has taken tax deed, and to make all necessary conveyances and assignments to carry out such agreement in such manner that the respective interests of the county and the irrigation district shall be fully segregated and thereafter separately owned and controlled; and the board of commissioners of such irrigation district shall have power to sell and convey such lands and interests so acquired by the irrigation district, or any part thereof, and any other property or assets, which such irrigation district may hold, at either public or private sale, or transfer such lands, or interests in lands, or other assets to creditors of the district in payment of the indebtedness of such irrigation district, upon such terms as shall, in the judgment of the board of irrigation district commissioners, be deemed most advantageous to the irrigation district. The board of commissioners of such irrigation district and the board of county commissioners of the county in which the lands of such irrigation district or any part thereof are situated, shall be and they are hereby authorized and empowered to do any and all things necessary to carry out the provisions and intentions of this act, the purpose of which is to enable such irrigation district to dispose of its assets in settlement of its liabilities and to be dissolved.

History: En. Sec. 1, Ch. 207, L. 1943.

89-1831. (7249) Liability of county treasurers. The county treasurer to whom district funds or securities are intrusted shall be liable on his bond for the safe keeping of said funds and securities, and such funds shall be properly divided into the respective funds for which district taxes or assessments were levied; that is to say, United States contract fund; bond principal and interest fund; sinking fund to redeem bonds; maintenance fund; construction fund; and general fund. The construction fund shall be available for the payment of the purchase price of all works, water rights, or other property purchased by or for the district, and all expenses incident thereto; as well as for the payment of the cost of construction of works, including cost of engineering, superintendence, and other expenses incident thereto. All warrants issued for preliminary and organization expenses and all administrative expenses shall be paid from the general fund. The county treasurer is authorized to receive, in lieu of cash, matured bonds and/or matured coupons or interest coupons maturing within the year in payment of any tax or assessment levied for the payment of bonds or interest on bonds, and the county treasurer at any time, upon the order of the board of commissioners of the district, shall turn over to said board any bonds or securities held by him and required to be delivered to said board in accordance with the provisions of this act.

All bonds and interest coupons so received or otherwise paid, and all bonds of the district upon the payment thereof, shall be immediately cancelled and retained by the county treasurer as vouchers.

History: En. Sec. 57, Ch. 146, L. 1909; amd. Sec. 19, Ch. 145, L. 1915; re-en. Sec. 7249, R. C. M. 1921; amd. Sec. 1, Ch. 114, L. 1933.

Limitation to Compel Payment of District Warrant

The county treasurer, made by law custodian of the funds of an irrigation dis-

trict the office of which is located in his county, therefore charged with duty not to pay out funds on claims believed by him to be invalid, could properly assert the defense of the five-year limitation in a proceeding to compel payment of a registered district warrant under sec. 93-2613. State ex rel. DeKalb v. Ferrell, 105 M 218, 221, 70 P 2d 290.

What Entitles Warrant Holder to Writ of Mandamus

To entitle a registered warrant holder to a writ of mandate to compel payment

thereon by the county treasurer out of the funds of an irrigation district, he must show treasurer's clear legal duty to pay and ability to comply with the writ, with sufficient money on hand in the fund to pay outstanding unpaid prior registered warrants with interest, secs. 16-2607, 16-2609 and 16-2605. State ex rel. DeKalb v. Ferrell, 105 M 218, 226, 70 P 2d 290.

Waters and Water Courses—227.

67 C.J. Waters § 892 et seq.

89-1832. (7250) Sale or transfer of lands. Where any lands in any district are sold or transferred either by deed, mortgage, foreclosure sale, or otherwise, such sale or transfer shall include the water belonging to and appurtenant to the land, whether or not the same is expressly stated in the deed, instrument of transfer, or decree, and such land shall be liable to special tax or assessment the same as if such sale or transfer had not been made.

History: En. Sec. 58, Ch. 146, L. 1909; re-en. Sec. 7250, R. C. M. 1921.

Waters and Water Courses—153-158½, 231, 253.

References

State et al. v. Board of Commissioners et al., 89 M 37, 93, 296 P 1.

67 C.J. Waters §§ 551 et seq., 925 et seq., 1071.

CHAPTER 19

IRRIGATION DISTRICTS—LIMITATION OF INDEBTEDNESS—VALIDATION OF WARRANTS—BANKRUPTCY—FINANCIAL AID

- Section 89-1901. Indebtedness of irrigation district—limitations upon.
 89-1902. Outstanding warrants declared valid.
 89-1903. Irrigation districts may invoke bankruptcy proceedings.
 89-1904. Construction of statute.
 89-1905. Conveyance of property of irrigation districts to water conservation board.
 89-1906. Conveyances by districts which have ceased operating.

89-1901. (7251) Indebtedness of irrigation district—limitations upon. No irrigation district now existing or hereafter created shall become indebted in any manner or for any purpose in any one year in an amount exceeding fifteen per cent. of the assessed valuation of said district, except that for the purpose of organization, or for any of the immediate purposes of this act, or in order to meet the expenses occasioned by any calamity or other unforeseen contingency, the board of commissioners may, in any one year, incur an additional indebtedness not exceeding ten per cent. of the assessed valuation of said district, and may cause warrants of the district to issue therefor, bearing interest at the rate not to exceed six per cent. per annum; provided, however, that this limitation shall not apply to the indebtedness for which bonds have been or may be issued as provided for by law, or to warrants issued for unpaid interest on the bonds of any irrigation district.

History: En. Sec. 1, Ch. 44, L. 1915; re-en. Sec. 7251, R. C. M. 1921. See also Sec. 89-1701.

References

State et al. v. Board of Commissioners

et al., 89 M 37, 99, 296 P 1; Judith Basin
Irr. Dist. v. Malott, 73 F. 2d 142.

Waters and Water Courses 227-230.
67 C.J. Waters § 892 et seq.
43 Am. Jur. 287, Public Securities and
Obligations §§ 21 et seq.

89-1902. (7252) Outstanding warrants declared valid. All warrants or other evidence of indebtedness heretofore issued by any irrigating district for an indebtedness incurred by said district, and for which said district received value, now outstanding and unpaid and in excess of any limitation provided by law, are hereby declared valid and enforceable obligations against such district, the same as though such limitation had not been exceeded, and any exchange of unsold portions of any authorized bond issue of any irrigation district for such outstanding warrants of said district is hereby declared valid.

History: En. Sec. 2, Ch. 44, L. 1915;
re-en. Sec. 7252, R. C. M. 1921.

Waters and Water Courses 227-230.
67 C.J. Waters § 892 et seq.

89-1903. Irrigation districts may invoke bankruptcy proceedings. The board of commissioners or directors of any irrigation district may, in the name and on behalf of such district, initiate and carry out proceedings for readjustment of the debts of such district, under Chapter IX of the Federal Bankruptcy Act, or similar provisions of any past or future federal bankruptcy act; and all such proceedings heretofore taken by any irrigation district or the officers thereof are hereby ratified and confirmed as valid acts of the district.

History: En. Sec. 1, Ch. 110, L. 1939.

8 C.J.S. Bankruptcy § 964.

Bankruptcy 41.

89-1904. Construction of statute. This statute is remedial in its nature and shall be liberally construed to effect its purpose, which is to permit irrigation districts to readjust their debts under federal bankruptcy acts and to confer upon the board of commissioners or directors thereof every power necessary therefor or reasonably incidental thereto.

History: En. Sec. 2, Ch. 110, L. 1939.

89-1905. Conveyance of property of irrigation districts to water conservation board. That in addition to all other powers heretofore granted any irrigation district, existing under the laws of Montana, for the purpose of securing financial aid in any form from the state water conservation board, shall be authorized and empowered to convey, assign, transfer and set over to the said state water conservation board all or any part of its property, including all water rights, rights of way, and easements for reservoirs, reservoir sites, canals, ditches, laterals, and headgates, as may be required by the said board as a condition to furnishing such financial aid or assistance.

History: En. Sec. 1, Ch. 191, L. 1937.

89-1906. Conveyances by districts which have ceased operating. If any irrigation district has ceased operation, such district prior to its dissolution shall be authorized and empowered to convey, assign, transfer and set over to any person or association of persons all or any part of its said property

enumerated in section 89-1905 for the purpose of irrigating and reclaiming any or all other land which can be served and irrigated therefrom.

History: En. Sec. 2, Ch. 191, L. 1937.

CHAPTER 20

IRRIGATION DISTRICTS—DISSOLUTION

Section	89-2001.	Proceedings for dissolution of district.
	89-2002.	Dissolution of districts having incurred indebtedness.
	89-2003.	Contents of petition.
	89-2004.	Corporation may be formed to carry out dissolution plan.
	89-2005.	Hearing on petition—order and notice.
	89-2006.	Court's authority at hearing—modification of proposed plan.
	89-2007.	Decree of court—sale of assets.
	89-2008.	Final decree of dissolution, when made.

89-2001. (7253) Proceedings for dissolution of district. Whenever an irrigation district has been organized under the provisions of this act, and no irrigation plant or system for the irrigation of the lands in the district has been constructed or purchased, and no bonded indebtedness has been incurred, and all expenses for the organization and all other indebtedness of the district have been paid, then such district may be dissolved by an order of the district court of the county in which the lands or the greater portion of the lands are situate. In order that the district court may acquire jurisdiction to enter such order dissolving the district, a petition must be filed with the clerk of said district court, signed by an equal number of holders of title or evidence of title as are required to sign the original petition for the creation of the district. The district court must make an order for the hearing of said petition within thirty days from its filing, and the clerk of the court must give due notice of the hearing of such petition by posting three notices in three public places in said district, and by publication of a notice of the hearing for two successive weeks in a newspaper of general circulation published in the county. Upon the hearing of said petition, any person interested may appear and give evidence for or against the granting of said petition. If, upon said hearing, the court finds that no bonded indebtedness of the district has been created, and all of the expenses of organization and all other indebtedness have been paid, and that the best interests of the landowners of said district require that the district shall be dissolved, the district court shall make such order dissolving said district, and shall cause a certified copy of the order to be recorded in the office of the county clerk and recorder of said county.

History: En. Sec. 3, Ch. 96, L. 1919; Waters and Water Courses \S 224.
re-en. Sec. 7253, R. C. M. 1921. 67 C.J. Waters \S 862 et seq.

References

Judith Basin Irr. Dist. v. Malott, 73 F.
2d 142.

89-2002. (7253.1) Dissolution of districts having incurred indebtedness. Any irrigation district organized and existing under the laws of the state of Montana may be dissolved by an order of the district court of the county in which the land or the greater portion of the lands of the district are situated, provided, however, that in case a district has incurred bonded in-

debtedness and has constructed or purchased any irrigation plant or system for the irrigation of the land in the district, it shall be necessary, in order that the district court may acquire jurisdiction to enter an order dissolving the district, that a petition be filed with the clerk of said district court, this petition shall be signed by an equal number of holders of title, or evidence of title as are required to sign the original petition for the creation of the district and must also be signed by a sufficient number of bondholders of the district, or by their assignees, or duly authorized agents, representing at least eighty percent (80%) of the outstanding bonds of said district; and provided further that in case a district has incurred bonded indebtedness but has not constructed or purchased any irrigation plant or system for the irrigation of land in the district, and more than ten (10) years have expired since the date of organization of the district, then in such case, such district may be dissolved by an order of the district court of the county in which the land or the greater part of the lands are situated, if the petition praying for dissolution shall be signed by a majority of the board of irrigation district commissioners and also by a sufficient number of bondholders of the district, or by their assignees, or duly authorized agents, representing at least eighty percent (80%) of the outstanding bonds of said district.

History: En. Sec. 1, Ch. 60, L. 1933;
amd. Sec. 1, Ch. 144, L. 1943.

89-2003. (7253.2) Contents of petition. Said petition shall set forth the amount of the outstanding bonds, coupons and other indebtedness, if such there be, together with the general description of the same, showing the amount of each description of indebtedness and the ownership, so far as known, of the same. Said petition shall also state the assets of said district, including irrigation system, if any, dams, reservoirs, canals, franchises, water rights and other property; and in case any proposition has been made by the holders of said indebtedness to settle the same, said proposition, together with any plan proposed to carry the same into execution, shall be included in said petition.

History: En. Sec. 2, Ch. 60, L. 1933.

89-2004. (7253.3) Corporation may be formed to carry out dissolution plan. In carrying out such plan and proposition, a corporation may be organized under the general laws for the purpose of acquiring the assets of said district, including the irrigation system, if any, dams, reservoirs, canals, franchises, water rights and other property, which corporation shall have all the powers, rights and franchises of corporate bodies organized under general laws, and in addition shall have such further power as may be necessary to possess and carry on said irrigation system and exercise such franchise and water rights.

History: En. Sec. 3, Ch. 60, L. 1933.

89-2005. (7253.4) Hearing on petition—order and notice. The district court must make an order for the hearing of the petition for the dissolution of the district within thirty days from its filing and the clerk of the court must give due notice of the hearing of said petition by posting three notices in three public places in said district, and by publication of a notice of the hearing for two successive weeks in a newspaper of general circulation

published in the county, and by mailing notice of said hearing to all known bondholders of the district. Upon the hearing of said petition any person interested may appear and give evidence for or against the granting of said petition.

History: En. Sec. 4, Ch. 60, 1933.

89-2006. (7253.5) Court's authority at hearing—modification of proposed plan. At the hearing by said court it shall determine the regularity, legality and correctness of all proceedings, and in so doing shall disregard any error, irregularity or omission which does not affect the substantial rights of the parties. The rules of pleading and practice in Title 93 not inconsistent with the provisions of this act are made applicable to the proceedings herein provided. The proceedings herein are declared to be for the general interest of the public and state. The hearing upon said petition shall be considered as an equitable action in rem. If the court shall consider, after hearing, that the plan proposed in the petition, is not in the public interest and will not promote public welfare or is unfair to bondholders or property holders or general creditors it may allow the petitioners to amend their petition and to submit a modified or different plan and hear the said amended petition and hear and dispose of objections to the same. The judgment may dissolve the district as a public corporation, transfer water rights appurtenant to lands, whether represented by shares of stock or otherwise, and divest the lien of bonds upon lands in the district.

History: En. Sec. 5, Ch. 60, L. 1933.

89-2007. (7253.6) Decree of court—sale of assets. The court, in its decree, shall have the power to make the orders necessary to carry out said proposition for the discharge of the indebtedness and distribution of the property of said district and may decree a sale of its assets in such manner as may effectuate said proposition and as the court may judge best, either in one lot or in such parcels as may be provided and may provide for conveyance of said irrigation system, including dams, reservoirs, canals, franchises, water rights and other property and also of any other assets of the district including lands sold thereto. The court, in its investigation and determination of said matter, may take into consideration the fact that payments have been made by certain of the water users in excess of other water users who have defaulted. In its decree the court may require that the purchaser of the assets may give consideration to various water users for payments theretofore made by them on the irrigation system.

History: En. Sec. 6, Ch. 60, L. 1933.

89-2008. (7253.7) Final decree of dissolution, when made. Whenever all the property of such irrigation district shall have been disposed of and all the obligations thereof, if any there be, shall have been discharged, the court shall enter a final decree declaring said district to be dissolved.

History: En. Sec. 7, Ch. 60, L. 1933.

CHAPTER 21

IRRIGATION DISTRICTS—APPEALS—MISCELLANEOUS PROVISIONS

- Section 89-2101. Consolidation of appeals.
 89-2102. Unsubstantial errors to be disregarded by court—rules of procedure—costs.
 89-2103. Liability of officers.
 89-2104. Surplus in construction fund.
 89-2105. Transfer of funds.
 89-2106. Written consent of owners—acknowledgment and recording.
 89-2107. Records—inspection—fees—reports.
 89-2108. Compensation and duties of secretary.
 89-2109. Interpretation of act.
 89-2110. Saving clause as to districts in process of organization.
 89-2111. District created by owners of rights in common water supply—purpose of act.
 89-2112. Application of act—requirements.
 89-2113. Establishment of district.
 89-2114. Sections not applicable.
 89-2115. Apportionment of water by commissioners.
 89-2116. Development of water supply—limit on levy for expenses.
 89-2117. Tax levy, how made.
 89-2118. Purpose and intent of act.
 89-2119. Validity of districts organized heretofore.
 89-2120. Contracts with United States—loans—sinking fund for betterments—investment.
 89-2121. Assessments to pay United States contracts.
 89-2122. Lien of amounts to be paid United States—special tax.
 89-2123. Assumption of operation by United States upon default in payments.
 89-2124. Liquidation of indebtedness with federal funds—procedure.
 89-2125. Petition for contract with United States—contents and requirements.
 89-2126. Court to approve contracts.
 89-2127. Procedure on confirmation of contract by court.
 89-2128. Application of act.

89-2101. (7254) Consolidation of appeals. If more than one appeal shall be pending at the same time concerning similar contests in this act provided for, such appeals shall be consolidated and tried together.

History: En. Sec. 59, Ch. 146, L. 1909; Waters and Water Courses \S 225 et seq.
 re-en. Sec. 7254, R. C. M. 1921. 67 C. J. Waters \S 862 et seq.

89-2102. (7255) Unsubstantial errors to be disregarded by court—rules of procedure—costs. The court hearing any of the contests or proceedings herein provided for shall disregard any error, irregularity, or omission which does not affect the substantial rights of the parties to said action or proceeding. The rules of pleading and practice provided by Title 93 which are not inconsistent with the provisions of this act are applicable to all actions or proceedings herein provided for. The costs of any such hearing or contest may be allowed and apportioned between the parties or taxed to the losing parties, in the discretion of the court.

History: En. Sec. 60, Ch. 146, L. 1909;
 re-en. Sec. 7255, R. C. M. 1921.

Operation and Effect

Where in a proceeding looking to the extension of an irrigation district the evidence heard at the trial was not taken and preserved by the court stenographer as it should have been, and the evidence was not incorporated in a bill of exceptions duly settled and allowed as it might

have been as far as obtainable, it will be presumed on appeal, in the absence of the evidence, that the district court heard and determined the question whether appellant's lands were benefited or not. In re Crow Creek Irrigation District, 63 M 293, 301, 207 P 121.

Under section 9835, R. C. M. 1921 (93-8802), providing that the final determination of the rights of a party to a special proceeding is a judgment, an order of the

district court directing the exclusion of the lands of a protestant from a proposed extension of an irrigation district is a final judgment. In re Bitter Root Irr. Dist., 67 M 436, 441, 218 P 945.

89-2103. (7256) Liability of officers. For any wilful violation of any express duty hereunder on the part of any officer herein named, he shall be liable upon his official bond and be subject to removal from office by proceedings brought in the district court of the county wherein the office of the board of commissioners of the district is located, by any tax or assessment payer of the district.

History: En. Sec. 61, Ch. 146, L. 1909;
re-en. Sec. 7256, R. C. M. 1921.

89-2104. (7257) Surplus in construction fund. In the event of any money remaining in the construction fund after the completion of any district project, the same may be transferred to an appropriate fund for the redemption of the outstanding bonds of the district.

History: En. Sec. 62, Ch. 146, L. 1909; Waters and Water Courses 228½, 230
re-en. Sec. 7257, R. C. M. 1921. (6).
67 C.J. Waters §§ 903, 910 et seq.

89-2105. (7258) Transfer of funds. The board of commissioners shall have power to transfer money from any one fund to any other fund, except that no money shall be drawn from the sinking fund or construction fund, except as specifically provided in this act; provided, that no money in the United States contract fund shall ever be diverted to any other fund.

History: En. Sec. 63, Ch. 146, L. 1909;
amd. Sec. 20, Ch. 145, L. 1915; re-en. Sec.
7258, R. C. M. 1921.

89-2106. (7259) Written consent of owners—acknowledgment and recording. Whenever any written consent is required to be given by or obtained from the owner or owners of any lands by any of the provisions of any of the sections of this act, such written consent must be acknowledged before some officer authorized to take acknowledgments, and shall be filed and recorded in the office of the clerk and recorder of the county in which such lands are situated, and a certified copy thereof must be filed in the office of the clerk of the court in the county in which the proceedings for the organization of such district were instituted, but the provisions of this section shall not apply to any petition provided for by this act; and all such petitions may be signed in any number of original parts with the same effect as though all signatures had been affixed to one instrument.

History: En. Sec. 64, Ch. 146, L. 1909;
re-en. Sec. 7259, R. C. M. 1921.

89-2107. (7260) Records—inspection—fees—reports. (1) It shall be the duty of the board of commissioners to keep or cause to be kept a full and complete book and record of the accounts, records, contracts, securities, minutes of meetings, and other matters of every kind pertaining to or belonging to the irrigation district, in the form prescribed by the state examiner. It is hereby made the duty of the state examiner to prescribe such forms for the use of irrigation districts, and to examine the same as provided by law for the examination of the affairs of county officers. Such books and records shall be open to the inspection of any landowner of the district in

the same manner as other public records. The failure of the board of commissioners to comply with the provisions of this section shall be grounds for removal from office and it is hereby made the duty of the county attorney of any county in which such irrigation district is situated to bring and prosecute ouster proceedings against any commissioner or commissioners, and the cost and expense thereof shall be a charge against such irrigation district, to be paid as are other bills against such districts.

(2) In case any district is appointed fiscal agent of the United States, or by the United States is authorized to make collections for or on behalf of the United States in connection with any federal irrigation project, such board of commissioners, or the secretary thereof, shall at any time allow any officer or employee of the United States, when acting under the orders of the secretary of the interior, to have access to all books, records, and vouchers of the district which are in possession or control of the secretary, or of said board.

(3) It shall be the duty of the board of commissioners to file with the county clerk and recorder of the county in which the district is located, annually, within ten days from and after March 1 of each year, a sworn report showing the assets and liabilities of the district, the amount of money received during the preceding year, and the amount expended during said time, and shall cause said report to be published at least once in the official newspaper of such county.

History: En. Sec. 65, Ch. 146, L. 1909; amd. Sec. 21, Ch. 145, L. 1915; amd. Sec. 1, Ch. 212, L. 1921; re-en. Sec. 7260, R. C. M. 1921; amd. Sec. 2, Ch. 195, L. 1945.

NOTE.—For fees of state examiner for making examinations see section 5-907.

Waters and Water Courses—227, 228.
67 C.J. Waters §§ 892 et seq., 901 et seq.

89-2108. (7261) Compensation and duties of secretary. The member of the board acting as secretary, or any person appointed by the board as secretary for the district, shall receive such compensation for his services as may be allowed by the board, and it shall be the duty of the secretary to keep the books and records of accounts, contracts, securities, and other records, and to perform his duties promptly each month; to make a monthly reconciliation of his accounts with the county treasurer. It shall be the duty of the county treasurer to make a monthly report to the secretary of all receipts, disbursements, and balances. A failure by the secretary to comply with the provisions of this section shall cause a forfeiture of his salary, and he shall be removed from office by the board.

History: En. Sec. 2, Ch. 212, L. 1921; re-en. Sec. 7261, R. C. M. 1921.

89-2109. (7262) Interpretation of act. The object of this act being to secure the irrigation of lands of the state, and thereby to promote the prosperity and welfare of the people, its provisions shall be liberally construed so as to effect the objects and purposes herein set forth.

History: En. Sec. 66, Ch. 146, L. 1909; re-en. Sec. 7262, R. C. M. 1921.

stone Irr. Dist., 44 M 492, 509, 121 P 283; Seilley v. Red Lodge-Rosebud Irr. Dist., 83 M 282, 298, 272 P 543.

References

Cited or applied as section 66, chapter 146, Laws of 1909, in O'Neill v. Yellow-

Waters and Water Courses—216.
67 C.J. Waters § 862 et seq.

89-2110. (7263) Saving clause as to districts in process of organization.

Wherever any irrigation district is now in process of organization under the provisions of sections 2309 to 2402, both inclusive, of the Revised Codes of Montana of 1907, said organization may be completed under said provisions, but after said organization is completed said district shall be governed by the provisions of this act; provided, that whenever any irrigation district shall have already been organized under the provisions of said sections of the Revised Codes, and shall have issued bonds or entered into any contract of purchase or construction, nothing contained in this act shall be construed as affecting the rights of the holders of said bonds, or of any person, persons, corporation, or association, party or parties to any such contract with said district, under or by virtue of any of the provisions of said sections of the Revised Codes. If a majority of the holders of title or evidence of title to lands included in the district heretofore organized, or being organized, under the provisions of said sections 2309 to 2402, both inclusive, of the said Revised Codes, said holders of title or evidence of title, also representing a majority in acreage of irrigable lands of said district, shall petition under the provisions of this act for the organization of a new district, including not less than four-fifths of the irrigable lands embraced within such districts so organized, or being organized, and shall pray for an order disorganizing such district and vacating all proceedings therein, the court shall have jurisdiction to proceed under this act to organize such new district, and in making its final order creating such new district shall also make an order vacating and disorganizing the old district. All money or property belonging to such old district shall be and become the money and property of such new district. Should any lands included in the old district not be included in the new district, the commissioners of the latter shall pay to the owner or owners of such land their just proportion thereof, on the basis of the last assessment made; and provided further, that all acts heretofore done by any board of county commissioners of any county of this state in connection with the organization of any irrigation district under the provisions of the foregoing sections of said Revised Codes shall be and are hereby ratified, confirmed, and declared valid and of full force and effect.

History: En. Sec. 67, Ch. 146, L. 1909;
re-en. Sec. 7263, R. C. M. 1921.

89-2111. (7264.1) District created by owners of rights in common water supply—purpose of act. It is the purpose and intention of this act, in the furtherance of the public welfare, to provide an effective public agency for the improvement, development, operation, maintenance and administration of certain existing irrigation systems in cases where administration thereof through the agency of a water commissioner is not effective.

History: En. Sec. 1, Ch. 100, L. 1925.

Operation and Effect

In 1923 more than 100 owners of land and water rights organized an irrigation district under then existing statutory provisions, without, however, conveying to the district their individual rights, and for the

sole purpose of having a central control body to perform the functions of a water commissioner in the operation, maintenance and management of its affairs. By Chapter 100, Laws of 1925 (this section), curative in character, a district so created was declared a public corporation. Held, in an action for injunction brought in

1927, that the district was a legally organized entity with power to operate, maintain and manage its irrigation system. *MacLay v. Missoula Irr. Dist. et al.*, 90 M 344, 357, 3 P 2d 286.

Waters and Water Courses—217.

67 C.J. Waters § 854 et seq.

30 Am. Jur. 653, Irrigation, §§ 77 et seq.

89-2112. (7264.2) Application of act—requirements. This act shall apply only when more than fifteen (15) owners of land, with water rights appurtenant thereto, shall have diverted water by means of a single intake from the source of supply, and shall have provided a single canal for conveying such water to the branches and laterals of an established irrigation system, serving at least one thousand (1000) acres of land contiguous in location or of reasonably compact area, and in which the rights to the use of the water shall have been determined by decree of a court of competent jurisdiction.

History: En. Sec. 2, Ch. 100, L. 1925;
amd. Sec. 1, Ch. 134, L. 1943.

89-2113. (7264.3) Establishment of district. Whenever the owners of land and water rights, situated as described in section 89-2112, desire to organize for the purposes mentioned in this act, such owners may propose the establishment and organization of an irrigation district under the provisions of sections 89-1201 to 89-2110, inclusive, in so far as such laws are applicable hereto and not in conflict with the purposes and provisions of this act.

History: En. Sec. 3, Ch. 100, L. 1925.

89-2114. (7264.4) Sections not applicable. The provisions of sections 89-1701 to 89-1714, inclusive, and sections 89-1501, 89-1607, 89-1608, 89-1610 and 89-1612 shall have no application to the organization of irrigation districts hereunder.

History: En. Sec. 4, Ch. 100, L. 1925.

89-2115. (7264.5) Apportionment of water by commissioners. The board of commissioners shall apportion the water for irrigation among the lands of the district in a just and equitable manner, and in compliance with the decree adjudicating the rights thereto, but the maximum amount apportioned to any land shall be the amount that can be beneficially used thereon.

History: En. Sec. 5, Ch. 100, L. 1925.

Waters and Water Courses—251.

67 C.J. Waters § 1054 et seq.

89-2116. (7264.6) Development of water supply—limit on levy for expenses. The board of commissioners of such irrigation district shall have authority to develop the source of supply and increase the means of distribution of water to the end that all owners of water rights under said system shall receive the amount of water which can be beneficially used upon their lands within the district; provided, however, that not more than four dollars (\$4.00) per acre, against each irrigable acre of land in the district, shall be levied in any one year on account of administrative expenses, cost of maintenance and repairs, development of water supply, or enlargement of distribution facilities.

History: En. Sec. 6, Ch. 100, L. 1925.

89-2117. (7264.7) Tax levy, how made. The annual tax levy, and the apportionment and distribution of the total amount required to be raised in any year shall be had and done in accordance with the provisions and limitations of law applicable to irrigation districts organized under the provisions of sections 89-1201 to 89-2110, inclusive.

History: En. Sec. 7, Ch. 100, L. 1925.

67 C.J. Waters § 925 et seq.

30 Am. Jur. 661, Irrigation, §§ 91 et seq.

Waters and Water Courses⇒231.

89-2118. (7264.8) Purpose and intent of act. It is the purpose and intention of this act to extend to irrigation districts organized hereunder the powers, duties and status of the public corporations organized under the irrigation district laws of the state of Montana, as the same may now, or hereafter exist; provided, that neither such districts nor the board of commissioners thereof shall have any power or authority to issue bonds or incur indebtedness, other than warrant indebtedness, under the limitations proposed by law; and provided further, that this law does not contemplate the acquisition by the district of the existing water, water rights or system or works owned by the respective water right owners within the district.

History: En. Sec. 8, Ch. 100, L. 1925.

89-2119. (7264.9) Validity of districts organized heretofore. Any irrigation district which has been heretofore organized under procedure in substantial compliance with the provisions of this act shall, upon the passage and approval of this act, become a public corporation, with the privileges and powers hereby conferred, to the same extent as if such irrigation district were organized under the authority of this act.

History: En. Sec. 9, Ch. 100, L. 1925.

Waters and Water Courses⇒224.

67 C.J. Waters § 862 et seq.

89-2120. (7264.10) Contracts with United States—loans—sinking fund for betterments—investment. The board of commissioners of any irrigation district established and organized under and by virtue of the laws of Montana, whenever deemed advisable and to the interest of the district, shall have the power and authority to enter into any obligation or contract with the United States under any act of congress providing for or permitting such obligation or contract, and the rules and regulations established thereunder, for the purpose of obtaining from the United States a loan of money to be used by the district for the liquidation of bonded or other outstanding indebtedness of the district, or for doing or causing to be done under the supervision of the secretary of the interior of the United States, any construction, betterments or repair work necessary to place the irrigation system of the district in good operating condition. The board shall also have the power and authority to create, by proper levy and collection of assessments, a sinking fund which shall be available for the construction of betterments to the irrigation system of the district, as may become necessary during the term of any contract made hereunder. Said sinking fund for said purpose, which shall be designated "..... District Sinking Fund for Betterments", shall be in such an amount and shall be created within such time as may be agreed upon between the district and the United States. The board shall also have the power and

authority to invest any surplus in the sinking fund herein provided for interest-bearing securities of the United States, or of the states approved by the Secretary of the Interior, and to deposit said securities with the Federal Reserve Bank or branch thereof.

History: En. Sec. 1, Ch. 24, L. 1931.

89-2121. (7264.11) Assessments to pay United States contracts. In any contract entered into between an irrigation district and the United States hereunder, the board of commissioners shall have the power to levy assessments for the United States Contract Fund against all of the land within the district for any and all of the purposes enumerated in the laws of Montana, and in addition thereto the power to levy assessments in compliance with such contract, including such deficiency assessments as will enable the district to meet established or estimated delinquencies in making payments to the United States because of the failure of land owners to pay the assessments levied against their lands in the district.

History: En. Sec. 2, Ch. 24, L. 1931.

Waters and Water Courses \S 231.
67 C.J. Waters \S 925 et seq.

89-2122. (7264.12) Lien of amounts to be paid United States—special tax. All amounts to be paid to the United States under any contract between the district and the United States made hereunder shall be a lien upon all the lands now within the district or hereafter embraced within the district, and for the benefit of which said contract between the district and the United States was made, and said amounts to be paid to the United States shall also be a lien upon the irrigation system of the district, and all such lands shall be subject to a special tax or assessment for the payment of all amounts to be paid to the United States under any such contract between the district and the United States, and said special tax or assessment shall constitute a first and prior lien on the land against which levied to the same extent and with like force and effect as taxes levied for state and county purposes.

History: En. Sec. 3, Ch. 24, L. 1931.

89-2123. (7264.13) Assumption of operation by United States upon default in payments. In addition to other legal remedies the board of commissioners of the district shall have the power and authority to provide in any contract executed between the United States and the district hereunder, that in case of default for more than 12 months in the payment of any installments due under such contract, the control, operation and maintenance of the district may, in the discretion of the secretary of the interior, be assumed by the United States, and the delivery of water withheld until payments are duly made in accordance with the contract requirements.

History: En. Sec. 4, Ch. 24, L. 1931.

89-2124. (7264.14) Liquidation of indebtedness with federal funds—procedure. When money is provided by the United States for liquidating bonded indebtedness of any irrigation district, the county treasurer is authorized and empowered to cancel the district bonds so liquidated, and surrender them to the United States, taking therefor a receipt signed by the secretary of the interior, which receipt shall be placed in the records

of the county treasurer, and shall be conclusive evidence of the cancellation and surrender of the district bonds.

History: En. Sec. 5, Ch. 24, L. 1931.

Waters and Water Courses—230.
67 C.J. Waters § 910 et seq.

89-2125. (7264.15) Petition for contract with United States—contents and requirements. No contract shall be made with the United States hereunder except upon a petition signed by at least sixty (60) per cent. in number and acreage of the holders of title or evidence of title to the lands included within the district; such petition shall be addressed to the board of commissioners; shall set forth the aggregate amount of money to be borrowed from the United States, and the purpose or purposes thereof; shall have attached thereto an affidavit certifying the signatures to said petition, and shall be filed with the secretary of the board of commissioners. Such petition may consist of one or more parts or papers.

History: En. Sec. 6, Ch. 24, L. 1931.

89-2126. (7264.16) Court to approve contracts. The board of commissioners of any irrigation district, before the making of any contract with the United States hereunder, shall commence a special proceeding in the district court of the state, in and by which the proceedings of the board and of said district leading up to the making of any such contract and the validity of the terms thereof shall be judicially examined, approved and affirmed, or disapproved or disaffirmed.

History: En. Sec. 7, Ch. 24, L. 1931.

89-2127. (7264.17) Procedure on confirmation of contract by court. The practice and procedure for the confirmation of any step or action in the last above section provided shall be as nearly as possible in conformity with the practice and procedure now provided for the confirmation before the issuance and sale of bonds of an irrigation district. The court may approve and affirm such proceedings in part and disapprove and declare illegal or invalid other and subsequent parts of the proceedings, and insofar as possible the court shall remedy and cure all defects in said proceedings.

History: En. Sec. 8, Ch. 24, L. 1931.

89-2128. (7264.18) Application of act. This act shall not limit the power and authority of an irrigation district or the commissioners thereof to contract with the United States under other applicable statutes, but shall be cumulative thereto.

History: En. Sec. 9, Ch. 24, L. 1931.

CHAPTER 22

DRAINAGE DISTRICTS—PETITION FOR CREATION— COURT PROCEDURE THEREON

Section	89-2201.	Petition for creation of drainage district—contents.
	89-2202.	Dissolution of drainage districts.
	89-2203.	Amendment of petition—circulation—consideration by court.
	89-2204.	Territory to be included.
	89-2205.	Hearing—court to order notice—publication.
	89-2206.	Affidavit in case of nonresident petitioners.
	89-2207.	Proof of service and publication.

- 89-2208. Personal service of notice to confer jurisdiction.
- 89-2209. Insufficient service—procedure.
- 89-2210. Service or publication of notice.
- 89-2211. Procedure on adjourned day—further publication.
- 89-2212. Contest by landowners.
- 89-2213. Sufficiency of petition—how determined.
- 89-2214. Affidavits may be received.
- 89-2215. Fraudulent deeds.
- 89-2216. Dismissal of petition—costs.
- 89-2217. Court to appoint commissioners—qualifications—dividing district.
- 89-2218. Oath and bond of commissioners—quorum.

89-2201. (7265) Petition for creation of drainage district—contents.

Whenever a majority of the adult owners of lands within any district of land, who shall represent one-third in area of the land within said district to be reclaimed or benefited, or whenever the adult owners of more than one-half of the lands within such district desire to construct one or more drains, ditches, levees, waste ditches or other works across the lands of others, or to straighten, widen, deepen, or otherwise alter any natural stream, or watercourse not navigable, for the promotion of the public health or welfare, and the drainage of said lands and removal of surface waters therefrom, or desire to maintain and keep in repair any such drain, ditch, or levee heretofore constructed under any law of this state, such owners may file in the district court of any county in which the lands, or any part of them, shall lie, a petition setting forth:

1. The proposed names of said drainage district;
2. The necessity of the proposed work, describing the necessity;
3. A general description of the proposed starting points, routes, and termini of the proposed drain, ditches, and levees;
4. A general description of the lands proposed to be included in said district;
5. The names of the owners of all lands in said district when known;
6. If the purpose of said petitioners is the enlargement, repair, and maintenance of a ditch, levee, or other work heretofore constructed under any law of this state, said petition shall give a general description of the same, with such particulars as may be deemed important;
7. Said petition shall pray for the organization of a drainage district by the name and with the boundaries proposed, and for the appointment of commissioners for the execution of such proposed work, according to the provisions of this and the following sections;

8. Any lands, the title to which is in the state of Montana, and which are within the boundaries of any drainage district heretofore created, or which may be hereafter created, may be included in any such drainage district in the same manner as is by law provided for adding other lands to drainage districts whenever it is found necessary to include lands in drainage districts as by the preceding paragraphs provided. Any and all copies of petitions or notices required by law to be served on account of such lands being included in such drainage districts, shall be served on the president of the board having control of such lands in the same manner as is hereinafter provided for the service of petitions and notices on other owners of lands in the district in which said lands are situated.

History: The first drain district act was Ch. 106, L. 1905; ap. as Secs. 2403-2497, Rev. C. 1907; amd. by Ch. 144, L. 1909; repealed by implication by Ch. 147, L. 1915; repealed by Ch. 129, L. 1921.

This section en. Sec. 1, Ch. 129, L. 1921; re-en. Sec. 7265, R. C. M. 1921.

When Counties Liable for Payment

In an action by drainage district created in 1921 under the provisions of sections 89-2201 to 89-2820, to recover assessments made against county for benefits accruing to its highways from its system, held, that the act, as it existed prior to amendment by chapter 169, laws of 1929 (89-2307, 89-2330, 89-2345 and 89-2346), was broad enough to authorize such assessments, as against contention that county could not be held for costs unless it owned lands in the district. State ex rel. Valley Center Drain District v. Board of County Commissioners, 100 M 581, 586, 51 P 2d 635.

References

In re Valley Center Drain District, 64

M 545, 548, 211 P 218; In re Mossmain Irrigation District, 90 M 1, 12, 300 P 280; State ex rel. Hall v. District Court, 109 M 228, 230, 95 P 2d 438.

Drains—14 (1, 2), 15.
28 C.J.S. Drains §§ 7, 8, 10, 14, 18, 19, 21, 22, 30, 34.

17 Am. Jur., Drains and Sewers, p. 792, §§ 22 et seq.; p. 796, §§ 30 et seq. See 48 Am. Jur. 671, Special or Local Assessments, §§ 122 et seq.

Scope and import of term "owner" in statute relating to formation of drainage district. 2 ALR 791.

Constitutionality of statute for formation or change of drainage district as affected by objection that it confers nondelegable powers, or imposes nonjudicial functions, on a court. 69 ALR 285.

Constitutionality and construction of statute which leaves to determination of private individuals the boundaries of territory to be erected into a drainage district. 70 ALR 1064.

89-2202. (7265.1) Dissolution of drainage districts. Whenever the adult owners of more than one-half of the lands within any drainage district, organized under the provisions of sections 89-2201 to 89-2820 inclusive shall present to the district court having jurisdiction of said drainage district, a petition signed by them, praying that such drainage district be dissolved, the judge of said court shall cause notice of such petition, together with a copy of said petition, to be served upon the commissioners of said district, directing them to show cause on a day certain, not less than fifteen nor more than thirty days from the date of the filing of said petition, why said petition should not be granted. The judge, at the time of receiving the petition, shall make an order forbidding the commissioners from incurring any further expense, or proceeding with the work of constructing a drain. On said day of hearing the court shall hear the same, and if it appears that the adult owners of more than one-half of the lands in said drainage district have signed said petition, it shall be granted, and thereupon, the court shall make an order directing the said commissioners to file a written report, under oath, setting forth the amount of the debts and obligations of said drainage district. Within thirty days after such report is filed, the court shall cause to be spread, or spread, a levy against all lands in said district on the basis of the final report of the commissioners, as confirmed by the court, and if no final report has been made, then on an area basis, and also enter judgment dissolving said district, and authorize the commissioners to settle the business of the district on the basis of the final report of said commissioners or on the area basis as confirmed by this court, said commissioners to render their services for same without pay.

History: En. Sec. 7265-A, Ch. 46, L. 1925.

Drains—16.
28 C.J.S. Drains § 9.
17 Am. Jur. 795, Drains and Sewers, § 29.

89-2203. (7266) Amendment of petition—circulation—consideration by court. No petition having as many signers as are required by this section shall be declared void, but the court may at any time permit the petition to be amended in form and substance to conform to the facts, if the facts justify the organization of a drainage district. Several similar petitions for the organization of the same district may be circulated, and, when filed, shall together be regarded as one petition having as many signers as there are separate adult signers on the several petitions filed, who own lands within said proposed drainage district. All petitions for the organization of said district filed prior to the hearing on said petition shall be considered by the court, the same as if filed with the first petitions placed on file, and the signatures thereon contained shall be counted in determining whether sufficient land owners have signed said petition.

History: En. Sec. 2, Ch. 129, L. 1921; ~~Drains~~ 14 (2).
re-en. Sec. 7266, R. C. M. 1921. 28 C.J.S. Drains §§ 14, 20, 21, 23.

89-2204. (7267) Territory to be included. Said territory need not be contiguous, provided that it be so situated that the public health or welfare will be promoted by such drainage of each part thereof, and the benefits of the proposed work in each part will exceed the damages from the costs of said proposed work in each part; and provided, further, that the court shall be satisfied that said proposed work can be more cheaply done if in a single district than otherwise.

History: En. Sec. 3, Ch. 129, L. 1921;
re-en. Sec. 7267, R. C. M. 1921.

89-2205. (7268) Hearing—court to order notice—publication. On such petition being filed the court or judge thereof shall make an order fixing a time and place of hearing thereon and ordering notice; thereupon the clerk of said court, for the county in which the proceedings are instituted, shall cause twenty days' notice of the filing of such petition to be given:

1. By posting notice thereof in at least five of the most public places in the proposed district in which said work is to be done;

2. By serving or causing to be served a copy of such notice on each owner of land within said proposed district, residing in any county in which any lands in said proposed district are situated, either personally or by leaving a copy thereof at his last usual place of abode, with a person of suitable age and discretion, to whom its contents shall be explained, and

3. By publishing a copy thereof at least once a week for three successive weeks in some newspaper published in each county from which any part of the district is proposed to be taken. If there be no newspaper in any such county, such notice may be published in a newspaper published in an adjoining county.

Such notice shall state:

1. In what court said petition is filed;
2. State briefly the starting points, routes, and termini of said drains, ditches, and levees;
3. Give a general description of the proposed work;
4. Give the proposed boundaries of said district (or a general description of all the lands in said proposed district);

5. Give the name proposed for said drainage district; and

6. Shall also state the time and place by the court fixed, when and where the petitioners will ask a hearing on said petition.

History: En. Sec. 4, Ch. 129, L. 1921;
re-en. Sec. 7268, R. C. M. 1921.

28 C.J.S. Drains §§ 14, 24, 28-33.
17 Am. Jur. 804, Drains and Sewers, § 45.
Sufficiency of statutory provisions for
notice and hearing in drainage proceedings.
84 ALR 1098.

Drains 14 (3).

89-2206. (7269) Affidavit in case of nonresident petitioners. If any of the owners of land in said district are nonresidents of the county or counties in which the proposed district lies, the petition shall be accompanied by an affidavit giving the names and postoffice addresses of such nonresidents, if such are known, and if unknown shall state that, upon diligent inquiry their names or postoffice addresses (whichever may be the fact) cannot be ascertained. The clerk of the court shall mail a copy of the notice aforesaid to each of said nonresident owners whose postoffice address is known, within six days after the first publication of the same.

History: En. Sec. 5, Ch. 129, L. 1921;
re-en. Sec. 7269, R. C. M. 1921.

89-2207. (7270) Proof of service and publication. The certificate of the clerk of the court, or other public officer, or the affidavit of any other person who knows the facts, affixed to a copy of said notice, shall be sufficient evidence of the posting, serving, mailing, or publication thereof.

History: En. Sec. 6, Ch. 129, L. 1921;
re-en. Sec. 7270, R. C. M. 1921.

89-2208. (7271) Personal service of notice to confer jurisdiction. Personal service of such notice on (or service by leaving at the last usual place of abode of) all owners of lands or easements or interest in lands within said district shall give the court complete jurisdiction, without posting, publication, or mailing of said notice.

History: En. Sec. 7, Ch. 129, L. 1921;
re-en. Sec. 7271, R. C. M. 1921.

89-2209. (7272) Insufficient service—procedure. If it shall be found, before the hearing on a petition for the organization of a drainage district, that one or more owners of land in said district have not been duly served with notice of hearing on said petition, the court, or presiding judge, shall not thereby lose jurisdiction. The court, or presiding judge, in such case shall adjourn the hearing, make an order directing the serving of said notice upon said landowner, and fixing the time and manner of service of such notice, which notice shall notify him to appear at said adjourned time and place and be heard on said petition.

History: En. Sec. 8, Ch. 129, L. 1921;
re-en. Sec. 7272, R. C. M. 1921.

89-2210. (7273) Service or publication of notice. Said notice shall be served personally or by leaving at the last usual place of abode of said unserved owners, as in section 89-2205 provided, not less than eight days before said adjourned hearing, or published not less than fourteen days before said adjourned hearing, in some newspaper published in the county in which

said owners' lands lie, or, if no newspaper be published in said county, then in some newspaper published in an adjoining county.

History: En. Sec. 9, Ch. 129, L. 1921;
re-en. Sec. 7273, R. C. M. 1921.

the service was defective does not merit consideration. In re Valley Center Drain District, 64 M 545, 554, 211 P 218.

Operation and Effect

Where the bill of exceptions prepared by appellant himself recited that the notice of an adjourned hearing looking to the organization of an irrigation district had been given and served as provided by law (this section), his contention that

17 Am. Jur. 804, Drains and Sewers, § 45.

Sufficiency of statutory provisions for notice and hearing in drainage proceedings. 84 ALR 1098.

89-2211. (7274) Procedure on adjourned day—further publication.

Upon the adjourned day the same proceedings, adjournments, trial findings, and orders may be had as in case of complete service of notice in the first instance. In case of failure to mail said notice as herein required, the court or judge may order the same mailed later, and shall adjourn said hearing so that said notice shall be mailed at least fourteen days before said adjourned hearing. In case of failure to publish or post notice, as in this act required, the court or judge may adjourn said hearing for sufficient time to permit the due posting and publication of said notice, and order said notice posted or published as in section 89-2205 directed. In case of adjournment to permit notice to be given, the notice shall state the fact of such adjournment and the time and place of hearing pursuant to said adjournment.

History: En. Sec. 10, Ch. 129, L. 1921;
re-en. Sec. 7274, R. C. M. 1921.

89-2212. (7275) Contest by landowners. On the day fixed for hearing on such petition, all parties owning lands, or any interest or easement in land, within said proposed district, or who would be affected thereby, may appear and contest:

1. The sufficiency of the petition;
2. The sufficiency of the signers of the petition;
3. The sufficiency of the notice;
4. The constitutionality of the law; and,
5. The jurisdiction of the court, specifying their objections to such jurisdiction; and the petitioners and contestants may, on the trial, offer any competent evidence in regard thereto. All notices of contest shall be in writing, and shall clearly specify the grounds of contest.

History: En. Sec. 11, Ch. 129, L. 1921;
re-en. Sec. 7275, R. C. M. 1921.

Failure of property owner to avail himself of remedy provided by statute or ordinance as precluding attack based on improper inclusion of property in, or exclusion of property from, assessment. 100 ALR 1292.

17 Am. Jur. 805, Drains and Sewers,
§ 46.

89-2213. (7276) Sufficiency of petition—how determined. The court shall hear and determine whether or not the petition contains the signatures of a majority of the adult owners of lands within the said proposed district who are of lawful age, and who represent one-third in area of the lands proposed to be affected by said work, or the signatures of the adult owners of more than one-half of such lands, and shall determine all questions of

law arising on said contest. The district court in which such petition shall be filed, or the judge thereof, may adjourn the hearing on said petition from time to time for want of sufficient notice, or to give time to prepare for trial, or for other good cause.

History: En. Sec. 12, Ch. 129, L. 1921;
re-en. Sec. 7276, R. C. M. 1921.

Where Writ of Supervisory Control Does Not Lie

The writ of supervisory control does not lie to review an intermediary order made by the district court pursuant to this section relating to determination of the sufficiency of a petition opposing the creation

of a drainage district, where every question raised by the application for the writ may be reviewed on appeal from the final order establishing the district. State ex rel. Hall v. District Court, 109 M 228, 230, 95 P 2d 438.

Drains⇒14(2).

28 C.J.S. Drains §§ 14, 20, 21, 23.

17 Am. Jur. 805, Drains and Sewers, § 47.

89-2214. (7277) Affidavits may be received. The affidavits of any ten or more of the signers of said petition, stating that they have examined it and are acquainted with the locality of said district and that said petition is signed by a sufficient number of adult owners of lands in said district to satisfy section 89-2201, may be taken by the court or judge as prima facie evidence of the facts therein stated. And the affidavit of any petitioner or other landowner before such court, or represented before the court, giving the age of such affiant and his or her ownership of such lands, to be named therein by proper description, shall be sufficient evidence to the court of such facts.

History: En. Sec. 13, Ch. 129, L. 1921;
re-en. Sec. 7277, R. C. M. 1921.

89-2215. (7278) Fraudulent deeds. All deeds made for the purpose of establishing or defeating the prayer of said petition, and not made in good faith and for a valuable consideration, shall be taken and held to be a fraud, and the holders thereof shall not be considered as the owners of the land described therein.

History: En. Sec. 14, Ch. 129, L. 1921;
re-en. Sec. 7278, R. C. M. 1921.

Drains⇒14 (1, 3).

28 C.J.S. Drains §§ 14, 18, 19, 21, 22, 24, 28-33, 34.

89-2216. (7279) Dismissal of petition—costs. If the court or presiding judge thereof, after hearing any and all competent evidence that may be offered for and against the said petition, shall find that the same has not been signed as herein required, the said petition shall be dismissed at the cost of the petitioners, and judgment shall be entered against said petitioners for the amount of said costs.

History: En. Sec. 15, Ch. 129, L. 1921;
re-en. Sec. 7279, R. C. M. 1921.

89-2217. (7280) Court to appoint commissioners—qualifications—dividing district. But if it shall appear that the petition has been so signed, the court or judge shall so find and order any necessary amendments thereto, and shall divide the district into three divisions, as nearly equal in area as possible, and shall appoint three suitable and competent persons as commissioners and fix their temporary bonds. In making such appointments one commissioner shall be appointed from each division and each person so appointed a commissioner must be an actual land owner and resident of the

county or counties in the division for which he is appointed such commissioner. If the district is situated in two or more counties, not more than two of said commissioners shall reside in one of said counties. Ownership of land within the district shall not disqualify a person from acting as a commissioner.

Ten per cent. of the adult owners or legally authorized agents or representatives of minor owners of lands within any drainage district heretofore created and organized, and in existence on the date when this act takes effect, may file a petition with the proper district court to have such district divided into divisions, and such court must thereupon make an order setting a day for hearing such petition, and cause a copy of such order to be served on each of the commissioners of such district at least five days before the date set for such hearing. On the day fixed in such order, or on any day to which such hearing may be regularly continued, the court must hear such petition, and after such hearing must make an order dividing such district into three divisions, as nearly equal in area as possible.

History: En. Sec. 16, Ch. 129, L. 1921; re-en. Sec. 7280, R. C. M. 1921; amd. Sec. 1, Ch. 50, L. 1925.

Operation and Effect

Since drainage district commissioners act only in an advisory capacity and their assessments of benefits and damages are reviewable on appeal after notice to all interested parties, the provision of this section that the fact that a person owns land in the proposed district shall not disqualify him from acting as commissioner, does not violate the principle that no one shall be the judge of his own

cause. In re Valley Center Drain District, 64 M 545, 549, 550, 211 P 218.

References

State ex rel. Hall v. District Court et al., 109 M 228, 230, 95 P 2d 438.

Drains—14 (3), 17, 32.

28 C.J.S. Drains §§ 11, 14, 24, 25, 26, 28, 33.

17 Am. Jur. 794, Drains and Sewers, §§ 27, 28.

Personal liability of officers of drainage districts for negligence of subordinates or employees causing damage to person or property. 61 ALR 300.

89-2218. (7281) Oath and bond of commissioners—quorum. Before entering upon their duties such commissioners shall take and subscribe an oath to support the constitution of the United States and the constitution of the state of Montana, to faithfully and impartially discharge their duties as such commissioners, and to render a true account of their doings to the court by which they are appointed whenever required by law or the order of the court, and shall execute a bond running to the clerk of said court and his successors in office as obligees, to be filed with said clerk for the benefit of the parties interested, in an amount to be fixed by the court or presiding judge, and with sureties to be approved by the court or presiding judge, conditioned for the faithful discharge of their duties as such commissioners and the faithful accounting for and application of all moneys which shall come into their hands as such commissioners. A majority shall constitute a quorum, and a concurrence of a majority in any matter within their duties shall be sufficient to its determination.

History: En. Sec. 17, Ch. 129, L. 1921; re-en. Sec. 7281, R. C. M. 1921.

sec. 6-201 at \$5,000 in counties of the first and second class.

NOTE.—Drain commissioner's bonds are fixed by sec. 1, ch. 66, L. 1939, amending

References

In re Valley Center Drain District, 64 M 545, 549, 211 P 218.

CHAPTER 23

DRAINAGE DISTRICTS—COMMISSIONERS—ELECTION--
ORGANIZATION—REPORTS

Section	89-2301.	Term of commissioners.
	89-2302.	Election of commissioners—terms of office.
	89-2303.	Notice of election.
	89-2304.	Manner of conducting election.
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	89-2306.	Nomination of commissioners—voting.
	89-2307.	Vacancies among commissioners—how filled.
	89-2308.	Record and vouchers.
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	89-2310.	Annual report of commissioners.
	89-2311.	Compensation of commissioners.
	89-2312.	Court to control commissioners.
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	89-2314.	Organization of commissioners—appointment of attorney and engineer preliminary report.
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	89-2339.	Notice of hearing of report.
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	89-2346.	Statement of costs before entry of judgment.
	89-2347.	Contribution among petitioners.
	89-2348.	Assessments for construction—annual instalment.
	89-2349.	Lien of assessments—payment of assessments against state lands.
	89-2350.	Power of commissioners in emergency—report of repairs, assessments and indebtedness.
	89-2351.	Same—court to hear.

89-2301. (7282) Term of commissioners. On the creation of a district the commissioners appointed by the judge or court shall hold office until the first Tuesday in May following their appointment, and until their successors are elected. When a district is in existence on the date when this act takes effect and thereafter an order is made dividing such district into divisions

the terms of office of such commissioners shall cease with the Monday immediately preceding the first Tuesday in May next following.

History: En. Sec. 18, Ch. 129, L. 1921;
re-en. Sec. 7282, R. C. M. 1921; amd. Sec. 2,
Ch. 50, L. 1925.

89-2302. (7283) Election of commissioners—terms of office. The regular election of commissioners shall be held annually on the first Tuesday in April of each year; the term of office of commissioners shall commence on the first Tuesday in May following their election. At the first regular election following the organization of a district, and in districts heretofore organized and in existence on the date when this act takes effect and which, on petition, has been divided into divisions, as hereinbefore provided, at the first regular election following the date of the order making such division, there shall be elected three commissioners, one commissioner being elected from each division of which he must be an actual land owner and resident of the county or counties; one of such commissioners, to be determined by lot, shall hold office until the first Tuesday in May in the year following his election, another of such commissioners, to be determined by lot, shall hold office until the first Tuesday in May in the second year following his election, and the third of such commissioners shall hold office until the first Tuesday in May in the third year following his election; thereafter one commissioner shall be elected each year who shall hold office for a term of three years and until his successor is elected and qualified; provided that the person elected as a commissioner in each year to succeed the commissioner whose term is then expiring must be elected as a commissioner from the same division as the commissioner whom he is to succeed.

History: En. Sec. 19, Ch. 129, L. 1921; 17 Am. Jur. 794, Drains and Sewers,
re-en. Sec. 7283, R. C. M. 1921; amd. Sec. 3, §§ 27, 28.
Ch. 50, L. 1925.

89-2303. (7283.1) Notice of election. Fifteen days before any regular election, the secretary of the board of commissioners shall give notice by mail to all land owners within the district of the time and place of holding the election. Prior to the mailing of such notices the board must, by resolution, designate a polling place and appoint three persons to act as judges and clerks of election in each precinct. The board shall prescribe the form and provide for the printing of the ballots for all elections.

History: En. as Sec. 7283 A, by Sec. 4,
Ch. 50, L. 1925.

89-2304. (7283.2) Manner of conducting election. Any judge of election may administer any oath required to be administered during the progress of an election. Before the opening of the polls the judges of election must take and subscribe an oath to faithfully perform the duties imposed upon them by law, and such oath may be administered by any elector. The polls shall open at 12 o'clock noon and be kept open until 5 o'clock P. M. when the same shall be closed. Such elections shall be conducted, except as herein otherwise provided, as nearly as practicable in accordance with the provisions of the general election laws of the state, except that no registration shall be required. As soon as the polls are closed the judges shall count

and tabulate the votes cast and make out a certificate, to be signed by them, showing the total number of votes cast at the election and the total number cast for each candidate for commissioner, and shall deliver such certificate, with a list of the electors voting at such election to the board of commissioners, and such board of commissioners shall meet on the first Monday following such election and canvass such returns. The board shall declare elected the person or persons, receiving the highest number of votes. The clerk of the board of directors shall enter the result of such canvass in the minutes of the board and file with the clerk of the district court creating the district a statement showing the names of the persons elected as commissioners, the names of the commissioners whose term will expire on the first Tuesday in May following, and the names of all of the persons who will compose the board of directors for the year next following the said first Tuesday in May.

History: En. as Sec. 7283 B, by Sec. 4,
Ch. 50, L. 1925.

89-2305. (7283.3) Qualifications of electors. At all such elections, except as herein otherwise expressly provided, the following persons holding title, or evidence of title to lands within the district shall be entitled to vote: (1) All of the persons having the qualifications of electors under the constitution and general laws of the state; (2) Guardians, administrators, executors and trustees residing in the state; (3) Domestic corporations by their duly authorized agents. In all elections each elector shall be permitted to cast one vote for each forty acres of land, or major fraction thereof in the district owned by such elector, but any elector owning twenty acres or less shall be entitled to one vote.

History: En. as Sec. 7283 C, by Sec. 4,
Ch. 50, L. 1925.

89-2306. (7283.4) Nomination of commissioners — voting. Candidates for the office of commissioner to be filled by election under the provisions of this act, may be nominated by petition filed with the secretary of the board of commissioners at least ten days prior to date of holding the election and signed by at least five electors of the district. If no nominations are made the electors of the district shall write on the ballots the name or names of the persons for whom they desire to vote, provided that nothing herein contained shall prevent an elector from voting for any qualified person, although the name does not appear on the official ballot.

History: En. as Sec. 7283 D, by Sec. 4,
Ch. 50, L. 1925.

89-2307. (7284) Vacancies among commissioners—how filled. If a vacancy occur in the board of commissioners the remaining members of the board shall elect some qualified elector to fill such vacancy and the person so elected shall hold such office for the unexpired term and until his successor is elected and qualified, provided, that the person so appointed must be appointed as a commissioner for the division in which such vacancy exists. But in the event there is a vacancy or vacancies in the board of commissioners by reason of no appointment being made due to the failure of the remaining members of the board to act, or on account of no election being

held, then, in that event, the judge of the court having jurisdiction over said drainage district, shall, upon the receipt of a petition signed by ten per cent. (10%) of the resident owners of land in said district, appoint to such vacancy or vacancies such person as the aforesaid petition may designate.

History: En. Sec. 20, Ch. 129, L. 1921; 5, Ch. 50, L. 1925; amd. Sec. 1, Ch. 169, re-en. Sec. 7284, R. C. M. 1921; amd. Sec. L. 1929.

89-2308. (7285) Record and vouchers. The commissioners shall keep an accurate record of all moneys collected on account of the work under their charge and of all payments made by them, and shall take vouchers for such payments, and shall keep full, accurate, and true minutes of all their proceedings.

History: En. Sec. 21, Ch. 129, L. 1921; Drains 17, 18, 32.
re-en. Sec. 7285, R. C. M. 1921. 28 C.J.S. Drains §§ 11, 12, 25, 26.

89-2309. (7286) Custody of funds. The county treasurer of the county wherein the court having jurisdiction of such district is located, shall be the custodian of all funds belonging to the district, and he shall pay out such funds upon warrants drawn by the board of commissioners of such district, except that the bonds of said district and the interest coupons thereon shall be payable as they mature, on presentation to such treasurer.

History: En. Sec. 22, Ch. 129, L. 1921;
re-en. Sec. 7286, R. C. M. 1921.

89-2310. (7287) Annual report of commissioners. On the first Tuesday of July of each year the commissioners shall file in the office of the clerk of the court having jurisdiction in the manner an itemized statement of all their receipts and disbursements, and leave said report in such office for examination by parties interested at all times.

History: En. Sec. 23, Ch. 129, L. 1921;
re-en. Sec. 7287, R. C. M. 1921.

89-2311. (7288) Compensation of commissioners. They shall receive for their services such compensation as the court or presiding judge thereof may determine. They shall also receive their actual reasonable expenses.

History: En. Sec. 24, Ch. 129, L. 1921;
re-en. Sec. 7288, R. C. M. 1921.

89-2312. (7289) Court to control commissioners. They shall at all times be under the control or direction of the court or presiding judge, and shall obey its or his directions; for failure so to do they shall forfeit their compensation and be dealt with summarily as for contempt.

History: En. Sec. 25, Ch. 129, L. 1921; 17 Am. Jur. 806, Drains and Sewers, § 48.
re-en. Sec. 7289, R. C. M. 1921.

89-2313. (7290) Suits on bonds of commissioners. Suit may also be brought upon their bonds, in the name of the clerk of the court, and the amount recovered shall be applied to the construction of the work or to the party injured, as justice may require.

History: En. Sec. 26, Ch. 129, L. 1921;
re-en. Sec. 7290, R. C. M. 1921.

89-2314. (7291) Organization of commissioners—appointment of attorney and engineer—preliminary report. Within ten days after said commis-

sioners shall be appointed and qualified, they shall meet and organize by electing one of their number president, and a secretary, who may or may not be one of their number; they shall appoint one or more attorneys to assist in the establishment of the district and advise with its officers, agents, and employees, prepare reports and other necessary documents. The court shall allow such attorney or attorneys just compensation to be taxed in the case. They shall also appoint a competent civil and drainage engineer, who may be an individual, a copartnership, or a corporation, who may employ assistants and make surveys, and, with the approval of the court, may employ a consulting engineer or secure expert advice, and the expense of the engineer, his assistants, and the consulting engineer shall be taxed as expenses under the petition. And as soon as may be, thereafter, they shall personally examine the lands in said district and make a preliminary report to the court, which report shall state:

1. Whether said proposed work is necessary, or would be of utility in carrying out the purposes of the petition;
2. Whether the proposed work would promote the public health;
3. Whether the proposed work would promote the public welfare;
4. Whether the total benefits from said proposed work will exceed the cost thereof, together with the damages resulting therefrom; and in arriving at this they shall include all benefits and all damages resulting therefrom both within and without said district;
5. Said commissioners shall in said report fix as near as may be and report to the court the boundaries of said proposed drainage district. Said boundaries shall not be so changed from those in the petition described as to deprive the court of jurisdiction by reason of not having on the petition the required number of signers owning land within said changed boundaries.

History: En. Sec. 27, Ch. 129, L. 1921; M 545, 549, 211 P 218; State ex rel. Hall v. District Court, 109 M 228, 231, 95 P 2d 438.

References

In re Valley Center Drain District, 64

89-2315. (7292) Commissioners to adopt feasible plan. If said proposed work, as in the petition described, is not best suited to carry out the purposes of the petition, the commissioners shall consider and base their report upon the one best suited to carry out those purposes, and propose to the court the one by them considered.

History: En. Sec. 28, Ch. 129, L. 1921; 17 Am. Jur. 810, Drains and Sewers, § 53. re-en. Sec. 7292, R. C. M. 1921.

89-2316. (7293) Hearing of preliminary report—publication of notice. Upon the filing of the preliminary report the court or the presiding judge thereof shall by order fix a time and place when and where the same shall be heard at some general or special term of said court, not less than thirty days from the filing of said report. Notice of the time and place of hearing upon said preliminary report shall be given to all interested persons by publishing a brief notice of the filing of said report, including a brief statement of the substance of said report, in one or more newspapers published in each county in which any land in said proposed drainage

district shall be situated (or, if no newspaper is published in said county, in one or more newspapers in an adjoining county) once in each week for three successive weeks prior to the day appointed for hearing thereon. Said notice shall describe all lands by said report included in said district, which were not included therein by the petition, and state that such lands are to be included in said district, and shall describe all lands excluded from said district which were by the petition included therein, and shall state that such lands are to be excluded from said district.

History: En. Sec. 29, Ch. 129, L. 1921; v. District Court, 109 M 228, 231, 95 P re-en. Sec. 7293, R. C. M. 1921. 2d 438.

References

In re Valley Center Drain District, 64 Drains 14, 18, 30 et seq.
M 545, 549, 211 P 218; State ex rel. Hall 28 C.J.S. Drains, §§ 12, 14, 23 et seq.

89-2317. (7294) Adjournment of hearing or trial of issues. Upon the day fixed for hearing upon said report, said court may adjourn said hearing for good cause, or may proceed to hear, try, and determine all issues arising upon said report.

History: En. Sec. 30, Ch. 129, L. 1921; Drains 14, 18, 34.
re-en. Sec. 7294, R. C. M. 1921. 28 C.J.S. Drains §§ 12, 14, 28, 31.

89-2318. (7295) Remonstrance by interested parties. Any interested party may appear and remonstrate against said report or any material part thereof. All remonstrances shall be in writing, be verified on oath, be filed at least five days before the day fixed for hearing, and shall set forth the facts upon which they are based.

History: En. Sec. 31, Ch. 129, L. 1921; 545, 549, 211 P 218; State ex rel. Hall v. re-en. Sec. 7295, R. C. M. 1921. District Court, 109 M 228, 231, 95 P 2d 438.

References

In re Valley Center Drain District, 64 M Drains 14, 18, 33.
28 C.J.S. Drains §§ 12, 14, 27.
17 Am. Jur. 805, Drains and Sewers, § 46.

89-2319. (7296) Service of owners of added lands. When lands are added to the district, the owners thereof shall be served with said notice as provided for serving of notice of hearing on the petition.

History: En. Sec. 32, Ch. 129, L. 1921; Drains 14, 18, 30.
re-en. Sec. 7296, R. C. M. 1921. 28 C.J.S. Drains §§ 12, 23.

References

State ex rel. Hall v. District Court, 109 M 228, 231, 95 P 2d 438.

89-2320. (7297) Issues, how tried—dismissal of—petition—costs. All issues arising upon said preliminary report shall be tried by the court without a jury. If the court shall find in favor of the remonstrance, or if said report be that the proposed work will not promote the public health, and will not promote the public welfare, or that the benefits from said proposed work will not exceed the damages and cost of construction, and no remonstrance against said report is filed, the petition shall be dismissed and the costs taxed against the petitioners, and judgment entered therefor, as in section 89-2345 hereinafter provided.

History: En. Sec. 33, Ch. 129, L. 1921;
re-en. Sec. 7297, R. C. M. 1921.

References

In re Valley Center Drain District, 64 M 545, 549, 211 P 218; State ex rel. Hall v. District Court, 109 M 228, 231, 95 P 2d 438.

89-2321. (7298) Entry of order of confirmation. But if the preliminary report be that the benefits of said proposed work (or work by the commissioners proposed) will exceed the damages and the cost of construction and that the public health will be promoted thereby, or that the public welfare will be promoted thereby, and no remonstrance thereto is filed, or if on the trial of the issues made on said report the court finds that the benefits will exceed the damages and cost of construction, and that the public health or the public welfare will be promoted by said proposed work, the court shall make and file such findings in writing, and make an order confirming said report, or directing amendment of the report to conform to the findings of said court. And when so amended the court shall by order confirm the same, and direct said commissioners to proceed with said work with all convenient speed.

History: En. Sec. 34, Ch. 129, L. 1921;
re-en. Sec. 7298, R. C. M. 1921.

M 545, 549, 211 P 218; State ex rel. Hall v. District Court, 109 M 228, 231, 95 P 2d 438.

References

In re Valley Center Drain District, 64 17 Am. Jur. 806, Drains and Sewers, § 48.

89-2322. (7299) Conclusiveness of order—appeals. Such findings and order shall be final and conclusive unless appealed from to the supreme court within thirty days after filing thereof.

History: En. Sec. 35, Ch. 129, L. 1921;
re-en. Sec. 7299, R. C. M. 1921.

v. District Court, 109 M 228, 231, 95 P 2d 438.

References

In re Valley Center Drain District, 64 Drains—14 (4), 18, 35.
M 545, 550, 211 P 218; State ex rel. Hall 28 C.J.S. Drains §§ 12, 14, 17, 29, 30, 36.

89-2323. (7300) Drainage district when organized—body corporate. Upon entering of such order of confirmation of said preliminary report of record, such drainage district shall be, and is thereby declared to be organized as a drainage district, by the name mentioned in said petition, or such other name as the court shall fix, with the boundaries fixed by the order confirming the report of said commissioners, to be a body corporate by said name fixed in said order, with the right to sue and be sued, to adopt and use a seal, and to have perpetual succession.

History: En. Sec. 36, Ch. 129, L. 1921;
re-en. Sec. 7300, R. C. M. 1921.

Drains—14.

28 C.J.S. Drains § 6.

References

State ex rel. Hall v. District Court, 109 17 Am. Jur. 793, Drains and Sewers,
M 228, 231, 95 P 2d 438. §§ 25, 26. See 48 Am. Jur. 663, Special or
Local Assessments, §§ 114 et seq.

89-2324. (7301) Commissioners corporate authority of district. The commissioners appointed as aforesaid and their successors in office shall, from the entry of such order of confirmation, constitute the corporate authority of said drainage district, and shall exercise the functions conferred

on them by law, and do all things and perform all acts necessary to the construction and preservation of the proposed work.

History: En. Sec. 37, Ch. 129, L. 1921;
re-en. Sec. 7301, R. C. M. 1921.

89-2325. (7302) Preliminary proceedings declared necessary. All proceedings herein required, prior to the entry of such order of confirmation of record, shall be deemed to be and are hereby declared to be necessary to the formation of said body corporate.

History: En. Sec. 38, Ch. 129, L. 1921; Drains 14.
re-en. Sec. 7302, R. C. M. 1921. 28 C.J.S. Drains § 14.

89-2326. (7303) Preparation of maps and surveys. As soon as may be after the confirmation of the said preliminary report, or within such time as the court may direct, said commissioners shall proceed to have all necessary levels taken and surveys made, and shall lay out said proposed work, make a map thereof and plans, profiles, and other specifications thereof, and report in writing to the court.

History: En. Sec. 39, Ch. 129, L. 1921; **References**
re-en. Sec. 7303, R. C. M. 1921. In re Mossmain Irrigation District, 90
M 1, 12, 300 P 280.

89-2327. (7304) Report as to routes and termini. First. Whether the starting points, routes, and termini of the proposed work, and the proposed location thereof as in the petition contained, are in all respects proper and feasible, and, if not, shall report such as are most proper and feasible.

History: En. Sec. 40, Ch. 129, L. 1921;
re-en. Sec. 7304, R. C. M. 1921.

89-2328. (7305) Report as to boundaries. Second. If it be found necessary to change the boundaries of said proposed district, as by them previously fixed, they shall report said proposed change, and, if possible, shall report the names, residence, and postoffice addresses of the owner or owners of all lands affected by said change in boundaries, but no such change in boundaries shall be made as to deprive the court of jurisdiction; provided, however, that if the owners of lands adjacent to the district petition to have their lands brought into the district such may be considered the same as original petitioners in making changes of boundaries.

History: En. Sec. 41, Ch. 129, L. 1921; 17 Am. Jur. 793, Drains and Sewers,
re-en. Sec. 7305, R. C. M. 1921. §§ 25, 26.

89-2329. (7306) Report as to injured lands. Third. What lands within the district, as by them reported, will be injured by the proposed work, if any, and they shall therein award to each tract, lot, easement, or interest by whomsoever held, the amount of damages which they shall determine will be caused to the same by the proposed work.

History: En. Sec. 42, Ch. 129, L. 1921; 17 Am. Jur. 811, Drains and Sewers, § 55
re-en. Sec. 7306, R. C. M. 1921. et seq.

89-2330. (7307) Report as to assessments. Fourth. What lands, easements, irrigation ditches, cities, towns, counties, individuals and other corporations and persons should be assessed for the payment of any part of the cost of constructing the proposed drains, repairs thereto, maintenance thereof and the incidental expenses attached to the establishment of such drain-

age district. In apportioning such costs and expenses, the following principles shall be regarded and the following classes of property, persons, corporations and municipalities shall be assessed:

All lands which are swampy, bogged or water-logged, and will be relieved and improved by virtue of the construction of the proposed drainage system;

All lands which are becoming, or are liable to become swampy, bogged, or water-logged, and which the construction of the proposed drainage system will prevent from being thus affected;

All lands from which surface or seepage waters will enter or can be conducted into the proposed drainage system;

All lands upon which or through which, surface or seepage water will be prevented from flowing, or can be prevented from flowing, by virtue of the construction of the proposed drainage system;

All lands which will sustain any direct benefit of any kind or character whatsoever;

All railways, whether operated by steam, electricity or otherwise, whose right-of-way or roadbed will be benefited or can be benefited by reason of the construction of the proposed drainage system.

All owners of irrigation ditches or canals included within said district or from which water seeps, drains or wastes to, upon or through lands included within the said district;

The county or counties which the proposed drainage system traverses, or which will be benefited as to public health, convenience, welfare or improvement of any public highway;

All incorporated cities or towns, and lands included within townsites and subdivisions, in whole or in part, directly benefited by reason of the construction of the proposed drainage system;

All of the above classes of lands, railways, irrigation ditches, counties, cities, towns, townsites and subdivisions shall be liable to assessment for the construction of the proposed drainage system in such proportions as may seem just and equitable.

The benefits to accrue from the construction of the proposed drainage system, to a railway, county, incorporated city or town, and lands included within a platted townsite or subdivision being of a different character than those to accrue to agricultural lands shall be considered in apportioning the assessment, and also, the damages and inconvenience caused by seepage and waste waters from irrigation ditches and from the higher lands, shall be considered in apportioning the assessment to them.

The assessment against each tract, lot, easement, town, city, county, irrigation ditch, railroad, individual or corporation owner thereof which will be benefited by the proposed work or which, in any manner, contributes to the swamped, seeped, bogged or water-logged condition of any land within said district, and the proportionate share of cost of construction of the proposed drainage system, which each of them should bear shall be shown in tabular form, the columns of which shall be headed as follows: Column 1—Owners of property assessed; 2—Description of property assessed; 3—Number of acres assessed; 4—Amount of benefits assessed; 5—Number of acres taken for right-of-way; 6—Value of property taken; 7—

Damages; 8—Assessment for costs; which shall be known as the assessment roll. Where property, persons or corporations, public or private, contribute to the damaged condition of the lands to be reclaimed, it shall not be necessary to assess in such assessment roll the benefits to be derived by or accruing to them.

History: En. Sec. 43, Ch. 129, L. 1921; re-en. Sec. 7307, R. C. M. 1921; amd. Sec. 2, Ch. 169, L. 1929.

County Subject to Assessment for Benefits

This section, both before and after amendment by chapter 169, laws of 1929, was broad enough to authorize assessments against a county for benefits to highways resulting from the system of a drainage district although the county did not own land within the district. *State ex rel. Valley Center Drain District v. Board of County Commissioners of Big Horn County*, 100 M 581, 586, 51 P 2d 635.

References

In re Mossmain Irrigation District, 90 M 1, 11, 300 P 280.

89-2331. (7308) Report as to costs. Fifth. They shall also determine and report to the court the total amount, as near as they can determine, that said proposed work will cost, which cost shall include all incidental expenses, the reasonable cost of organizing said district, the costs of proceeding and all probable damage to lands, both within and without the district, together with a reasonable attorney fee for the petitioners, which cost will hereinafter be referred to as "cost of construction."

History: En. Sec. 44, Ch. 129, L. 1921; re-en. Sec. 7308, R. C. M. 1921. 17 Am. Jur. 813, Drains and Sewers, § 57.

89-2332. (7309) Report as to assessments against lots and corporations. If the cost of construction of any particular part of the work so proposed to be done should be assessed upon any particular tract or tracts, lot or lots of land, or upon any corporation or corporations, the commissioners shall so specify, and in their report they shall fix and determine the sums which should be assessed against said tracts, lots, and corporations, and assess such sum against said tracts, lots, and corporations.

History: En. Sec. 45, Ch. 129, L. 1921; re-en. Sec. 7309, R. C. M. 1921. 17 Am. Jur. 816, Drains and Sewers, §§ 63 et seq.

89-2333. (7310) Report as to special benefits to corporations. And if any corporation would, in the judgment of said commissioners, derive special benefits from the whole or any part of such proposed work, the commissioners shall so report and assess those benefits and assess against the same its proportionate share of the costs of said proposed work. The word "corporation," whenever in this act contained, shall be construed to include:

1. Railroad companies;
2. Other private and quasi public corporations of all kinds;
3. Towns;
4. Cities;

5. Villages;
6. Other drainage districts; and,
7. Counties.

History: En. Sec. 46, Ch. 129, L. 1921; trict v. Board of County Commissioners,
re-en. Sec. 7310, R. C. M. 1921. 100 M 581, 585, 51 P 2d 635.

References 17 Am. Jur. 819, Drains and Sewers,
State ex rel. Valley Center Drain Dis- §§ 67, 68.

89-2334. (7311) Apportionment of costs of construction. They shall apportion and assess the part of this "cost of construction," not assessed as above, against the several benefited tracts, lots, and easements in said drainage district, in proportion to the benefits which they have assessed against the same, by setting down opposite each tract, lot, or easement the sum which they assess against the same for construction. The assessments which together make up the cost of construction, as above defined, are herein referred to as "assessments for construction."

History: En. Sec. 47, Ch. 129, L. 1921; 28 C.J.S. Drains § 59.
re-en. Sec. 7311, R. C. M. 1921. 17 Am. Jur. 816, Drains and Sewers,
§§ 63 et seq. See generally, 48 Am. Jur.
555, Special or Local Assessments.

Drains—71.

89-2335. (7312) Report as to cost of upkeep. Sixth. The commissioners shall further report to the court the probable cost of keeping said proposed work in repair after it is completed.

History: En. Sec. 48, Ch. 129, L. 1921;
re-en. Sec. 7312, R. C. M. 1921.

89-2336. (7313) Report to include maps. Seventh. They shall include in their said report said map, plans, and other specifications, and file the same with their report.

History: En. Sec. 49, Ch. 129, L. 1921;
re-en. Sec. 7313, R. C. M. 1921.

89-2337. (7314) Commissioners to use most feasible plan—alteration by court. The commissioners shall not be confined to the points of commencement, routes, or termini of the drains or ditches, or the number, extent, or size of the same, or the location, plan, or extent of any levee, ditch, or other work, as proposed by the petitioners, but shall locate, design, lay out, and plan the same in such manner as to them shall seem best, to promote the public health or welfare, and to drain, or to protect the lands of the parties interested with the least damage and the greatest benefit to all lands affected thereby. And any plan proposed by the commissioners may, on the application of any person interested, on the hearing hereinafter provided for, or on the application of the commissioners, be altered by the court, by written order, in such manner as shall appear to the court to be just.

History: En. Sec. 50, Ch. 129, L. 1921; 17 Am. Jur. 810, Drains and Sewers, § 53.
re-en. Sec. 7314, R. C. M. 1921.

89-2338. (7315) Extension or reduction of boundaries—alteration by court. If the commissioners find that the proposed district, as described in the petition filed, will not embrace all of the lands that will be benefited by the proposed work, or that it will include lands that will not be benefited

and are not necessary to be included in said district for any purpose, they shall extend or contract the boundaries of the proposed district so as to include or exclude all such lands, as the case may be; and the boundaries adopted and reported by them may, upon the hearing of their report, as hereinafter provided, upon their application, or that of any person interested, be altered by the court in such manner as shall appear to be just; provided, that the alteration of boundaries as aforesaid shall not have the effect of so far enlarging or contracting the proposed district as to render such petition void or dismissable. Said report shall be filed with the clerk of the court.

History: En. Sec. 51, Ch. 129, L. 1921;
re-en. Sec. 7315, R. C. M. 1921.

28 C.J.S. Drains §§ 7, 8, 10.
17 Am. Jur. 793, Drains and Sewers,
§§ 25, 26.

Drains⇒15.

89-2339. (7316) Notice of hearing of report. Upon the filing of such report, the court shall make an order fixing the time and place when and where all persons interested may appear and remonstrate against the confirmation thereof, and the clerk of such court shall cause notice to be given to all parties interested by publication thereof for at least three successive weeks before the date of such hearing in at least one newspaper in each county wherein lands located in such district are situate, which notice shall contain a statement of the time and place of the hearing of said report, and a brief statement of the substance thereof.

History: En. Sec. 52, Ch. 129, L. 1921;
re-en. Sec. 7316, R. C. M. 1921.

Drains⇒18, 34.
28 C.J.S. Drains §§ 12, 28, 31.

89-2340. (7317) Clerk to mail notice to landowners. Upon a date not later than the date of the first publication of the notice in the last paragraph referred to, the clerk of such court shall also cause to be mailed to each of the persons or corporations recommended by said report to be assessed, or whose lands are by said report recommended to be included in said district, at his or its last known postoffice address, a notice containing a brief description of the land or easement belonging to such person or corporation benefited or damaged, and of the net damage awarded to such tract, parcel, easement, or corporation, and the sum assessed against such benefited parcel, tract, easement, or corporation.

History: En. Sec. 53, Ch. 129, L. 1921;
re-en. Sec. 7317, R. C. M. 1921.

89-2341. (7318) Modification of report. If the court finds that the report requires modification, the same may, by order of the court, be referred back to the commissioners, who may be required to modify it in any respect.

History: En. Sec. 54, Ch. 129, L. 1921;
re-en. Sec. 7318, R. C. M. 1921.

89-2342. (7319) Confirmation of report—appeals—bond of commissioners. If there be no remonstrance, or if the finding be in favor of the validity of the proceedings, or after the report shall have been modified to conform to the findings, the court shall confirm the report and the order of confirmation shall be final and conclusive, the proposed work shall be established and authorized, and the proposed assessments approved and confirmed, unless within thirty days an appeal be taken to the supreme

court; the said order of confirmation shall also fix the commissioners' bond.

History: En. Sec. 55, Ch. 129, L. 1921;
re-en. Sec. 7319, R. C. M. 1921.

References

In re Valley Center Drain District, 64
M 545, 549, 550, 211 P 218.

17 Am. Jur., Drains and Sewers, p. 807,
§§ 49, 50; p. 823, § 75; p. 827, § 80. See
generally, 48 Am. Jur. 555, Special or Local
Assessments.

Validity of rule of assessment for drain-
age improvement. 2 ALR 625.

Right of appeal as essential to due pro-
cess of law. 84 ALR 1109.

89-2343. (7320) Modification of order. Said order of confirmation may, at the same or at any subsequent term of said court, be revised, modified, or changed, in whole or in part, on petition of the commissioners, after such notice as the court may require, to parties adversely interested.

History: En. Sec. 56, Ch. 129, L. 1921;
re-en. Sec. 7320, R. C. M. 1921.

89-2344. (7321) Supplemental report. At any time prior to making the order confirming said report, or thereafter, the court may permit the commissioners to present and file a supplemental report, or amend their report, as to any matter which, pursuant to the provisions hereof, was or might have been included in the original report presented by them, and after reasonable notice given to all parties interested, in such manner as the court shall direct, the court may, upon the hearing in said matter, make such order as the case may require.

History: En. Sec. 57, Ch. 129, L. 1921;
re-en. Sec. 7321, R. C. M. 1921.

89-2345. (7322) Judgment on dismissal of proceedings. In case the petition or proceedings are dismissed as provided in section 89-2320, a judgment shall be entered against the petitioners and in favor of the commissioners for the costs, expenses, and liabilities incurred in said proceedings, but for the benefit of those who have rendered services or advanced money in the prosecution of said proceedings, or have recovered costs on successful contests therein.

In case the proceedings are dismissed at any time or the district is discontinued for any cause subsequent to the time provided in section 89-2320, a judgment shall be entered directing the commissioners of the district to assess the costs, expenses, and liabilities incurred in said proceedings up to and including the time of such dismissal and discontinuation on an acreage basis against the lands in said district, which assessment shall be a lien upon said lands from the date of said judgment superior to the lien of any other judgment, mortgage or mechanic's lien against said lands. Said assessment shall be verified by the commissioners of the district the same as assessments to pay costs of construction and such assessments shall be spread upon the tax rolls of the counties in which said district is situated and shall be collected by the county treasurers of such counties the same as assessments to pay costs of construction are collected. Such assessments shall be payable on or before November 30 following the date upon which they are so spread upon the assessment roll of such counties. The money so collected shall be paid out upon warrants issued by the commissioners of the district to those who have rendered

service or advanced money in connection with said district or have recovered costs on successful contests therein. Should such assessment, for any cause, be not sufficient for all such costs, expenses and liabilities, then additional assessments shall be made and collected in like manner until sufficient funds have been raised to pay all such costs, expenses and liabilities.

History: En. Sec. 58, Ch. 129, L. 1921; Drains 14(3), 35.
 re-en. Sec. 7322, R. C. M. 1921; amd. Sec. 28 C.J.S. Drains, §§ 14, 24, 28-33.
 3, Ch. 169, L. 1929.

89-2346. (7323) Statement of costs before entry of judgment. Before any such judgment is entered, said commissioners shall file with the clerk of the district court, in which said proceedings were instituted, an itemized statement of such costs and expenses, duly verified, upon which an order shall issue requiring said petitioners or landowners to show cause before said court, at a time and place named, why judgment should not be entered against said petitioners or landowners for the amount of said costs and expenses. Notice of the hearing of said order to show cause shall be given to said petitioners or landowners by mailing to each a copy thereof, to their last known post office address, at least twenty days prior to the time set for hearing, and by publication of the same in one or more newspapers published in the county where the proceedings are pending, at least three successive weeks prior to the day set for such hearing. Said notice need not contain an itemized statement of said account.

History: En. Sec. 59, Ch. 129, L. 1921; Drains 14(3), 38.
 re-en. Sec. 7323, R. C. M. 1921; amd. Sec. 28 C.J.S. Drains §§ 14, 24, 28-33, 34.
 4, Ch. 169, L. 1929.

89-2347. (7324) Contribution among petitioners. All petitioners shall, among themselves, contribute to the payment of said judgment in proportion to the number of acres of land they have within the boundaries of the proposed district at the time of filing of said petition.

History: En. Sec. 60, Ch. 129, L. 1921;
 re-en. Sec. 7324, R. C. M. 1921.

89-2348. (7325) Assessments for construction—annual instalment. At the time of the confirmation of such assessments, it shall be competent for the court to order the assessment for construction of new work, to be paid in not more than fifteen annual instalments, of such amounts and at such times as will be convenient for the accomplishment of the proposed work, or for the payment of the principal and interest of such notes or bonds of said district, as the court shall grant authority to issue, for the construction of new work. The court shall also, by such order, fix a date on which the first instalment of the assessments for construction shall become due, not more than five years after the date of the order, and each of said instalments shall draw interest at the rate of seven per cent per annum from the date of said order.

History: En. Sec. 61, Ch. 129, L. 1921; 28 C.J.S. Drains § 55 et seq.
 re-en. Sec. 7325, R. C. M. 1921. 17 Am. Jur. 816, Drains and Sewers,
 §§ 63 et seq. See generally, 48 Am. Jur. 555,
 Special or Local Assessments.

Drains 66 et seq.

89-2349. (7326) Lien of assessments—payment of assessments against state lands. From the time of the entry of said order, assessments for con-

struction of new work and additional assessments and interest thereon shall be a lien upon the lands assessed, until paid. Any owner of land, or any corporation assessed for construction, may, at any time within thirty days after the confirmation of said report, pay into court the amount of the assessment against his land or any tract thereof, or against any such corporation. Said payment shall relieve said lands from the lien of said assessment, and said corporation from all liability on said assessment.

Upon presentation to the state auditor of an order of the district court having jurisdiction of such drainage district, properly certified, the auditor shall draw his warrant on the treasurer on the common school fund in favor of the commissioners of such drainage district for the total amount that may be assessed against any lands included in such district, the title to which is in the state of Montana, and upon the payment of such warrant such lands shall thereby be relieved from the lien theretofore created for such costs of construction.

History: En. Sec. 62, Ch. 129, L. 1921; re-en. Sec. 7326, R. C. M. 1921.

Legislature's Authority to Include What Lands

The legislature has authority to include state lands not used for governmental purposes within special improvement or drainage districts and make them subject to assessments to the extent they are bene-

fited, such assessments not being "taxes" within the meaning of constitutional and statutory provisions. *State ex rel. Freebourn v. Yellowstone County*, 108 M 21, 27, 88 P 2d 6.

Drains—70, 84.

28 C.J.S. Drains §§ 57, 77.

17 Am. Jur. 828, Drains and Sewers, § 82.

89-2350. (7327) Power of commissioners in emergency—report of repairs, assessments and indebtedness. Commissioners having charge of any completed drain, ditch, levee or other work constructed under any drainage law of the state of Montana, whether now in force or repealed, shall be authorized, in the case of an emergency, to make such repairs as may be necessary for the preservation and protection of the work under their control. They shall, on or before the first Tuesday of March of each year, file with the clerk of court having jurisdiction a report in which they shall specify in detail the emergency repairs which they have made during the preceding year, the labor and repairs then necessary to the preservation and protection of the work under their control, the places where such labor and repairs are especially needed, the amount of the outstanding indebtedness of the district and the sum to be assessed against each tract, lot, easement or corporation to pay all emergency repairs theretofore done, necessary labor and repairs to be done during the ensuing year, maintenance, incidental expenses and interest on and principal of all outstanding indebtedness. No notice of the filing of such report shall be necessary. All such assessments shall be apportioned on the last assessment roll of drain districts or on the last assessments in drainage districts confirmed by the court having jurisdiction thereof.

History: En. Sec. 63, Ch. 129, L. 1921; re-en. Sec. 7327, R. C. M. 1921; amd. Sec. 5, Ch. 169, L. 1929; amd. Sec. 1, Ch. 97, L. 1931.

References

In re Valley Center Drain District, 64 M 545, 549, 211 P 218.

Drains—32, 52, 79.

28 C.J.S. Drains §§ 25, 26, 46, 66.

89-2351. (7328) Same—court to hear. Within thirty days after filing such annual report, at a time and place to be fixed by the court or presiding judge, the court or presiding judge shall examine said report, hear all objections to the same, fix and determine the amount of such assessments, and cause such adjudication to be entered of record in said court, and a certified copy of the same to be delivered to said commissioners.

History: En. Sec. 64, Ch. 129, L. 1921;
re-en. Sec. 7328, R. C. M. 1921.

References

In re Valley Center Drain District, 64
M 545, 549, 211 P 218.

Drains⇒34, 81.

28 C.J.S. Drains §§ 28, 31, 69, 71.

CHAPTER 24

DRAINAGE DISTRICTS—TAXES AND ASSESSMENTS

- Section 89-2401. District taxes—how certified and collected.
89-2402. Collection of taxes when lands in more than one county.
89-2403. Rules of law applicable to collection of taxes.
89-2404. Assessments against certain corporations—when payable.
89-2405. Procedure on failure to certify assessments.
89-2406. Commissioners' right of entry.
89-2407. Commissioners' right to construct drains across railroads.
89-2408. Liability of district to railroad for cost of bridges, etc.
89-2409. Railroads to permit construction of ditches—penalty.
89-2410. Additional assessments, procedure to levy.
89-2411. Omissions—how corrected.
89-2412. Illegal assessments—costs—how defrayed.

89-2401. (7329) District taxes—how certified and collected. On or before the third Monday in August of each year the commissioners shall certify to the county assessor of each county wherein the lands of the district are situate, a correct list of all the district lands in such county and the owners thereof, together with a statement of the amount of the total tax or assessment against said lands for district purposes for that year. The county assessor of each county shall immediately thereupon cause said assessment roll to be entered in the assessment book of said county for each year and prior to the delivery of the assessment book to the county treasurer. The county treasurer of each county shall collect such taxes or assessments at the same time and in the same manner as county and state taxes.

History: En. Sec. 65, Ch. 129, L. 1921;
re-en. Sec. 7329, R. C. M. 1921; amd.
Sec. 1, Ch. 12, L. 1945.

References

State ex rel. Freebourn v. Yellowstone
County, 108 M 21, 26, 88 P 2d 6.

Cross-Reference

Collection of taxes and assessments, Drains⇒87-91.
method, sec. 84-4108. 28 C.J.S. Drains §§ 75, 82-85.

89-2402. (7330) Collection of taxes when lands in more than one county. Where lands of any district lie in more than one county, the district taxes or assessments collected in all other counties shall be remitted to the county treasurer of the county wherein the court having jurisdiction of said district is located, on or before the first day of January of each year.

History: En. Sec. 66, Ch. 129, L. 1921;
re-en. Sec. 7330, R. C. M. 1921.

Drains⇒88.

28 C.J.S. Drains § 85.

89-2403. (7331) Rules of law applicable to collection of taxes. The rules of law applying to the collection of taxes and sale of land for taxes shall, unless in conflict with this act, apply to the collection and sale of lands for drainage assessments, and delinquent sales of land for unpaid taxes and assessments shall be made in the same manner as for state and county taxes in the respective counties where such lands are situate, and the right of redemption shall in all cases be made the same as in cases where lands are sold for state or county taxes. Such drainage district shall be entitled to the benefit of all penalties and interest upon delinquent district assessments.

History: En. Sec. 67, Ch. 129, L. 1921;
re-en. Sec. 7331, R. C. M. 1921.

Drains↪87-91.

28 C.J.S. Drains §§ 75, 82-85.

17 Am. Jur. 827, Drains and Sewers,
§§ 81 et seq.

References

State ex rel. Valley Center Drain District v. Board of County Commissioners, 100 M 581, 587, 51 P 2d 635.

89-2404. (7332) Assessments against certain corporations—when payable. Assessments against all public corporations, or any private corporation not owning land within the district, shall be payable to the county treasurer wherein the court having jurisdiction of the district is located, on or before the first day of September of each year.

History: En. Sec. 68, Ch. 129, L. 1921;
re-en. Sec. 7332, R. C. M. 1921.

district v. Board of County Commissioners, 100 M 581, 586, 51 P 2d 635.

References

State ex rel. Valley Center Drain Dis-

Drains↪85.

28 C.J.S. Drains § 80.

89-2405. (7333) Procedure on failure to certify assessments. When commissioners shall fail to certify to the county treasurer of the proper county any one or more drainage assessments for construction or repair, or additional assessment against any lands in said district, at the proper time, they may certify the same to the county treasurer at any time thereafter, whether in the same or any subsequent year.

History: En. Sec. 69, Ch. 129, L. 1921;
re-en. Sec. 7333, R. C. M. 1921.

Drains↪76.

28 C.J.S. Drains §§ 63, 64.

89-2406. (7334) Commissioners' right of entry. The commissioners, their agents, servants, and employees, shall have the right to go upon all lands along any drain, ditch, levee, or embankment in their district, to inspect, deepen, widen, and repair the same, whenever necessary, doing no unnecessary damage, and shall not be liable for trespass therefor.

History: En. Sec. 70, Ch. 129, L. 1921;
re-en. Sec. 7334, R. C. M. 1921.

Drains↪18, 19, 42-55.

28 C.J.S. Drains §§ 12, 24, 39-48.

89-2407. (7335) Commissioners' right to construct drains across railroads. Said commissioners shall have the right to lay out and construct all necessary drains, ditches, and levees across any railway right-of-way or yards in their district, and any railway company whose right-of-way or yards crosses the line of any proposed drain, ditch, or levee shall open its right-of-way or yards and permit such drain, ditch, or levee to cross the same, as soon as said drain, ditch, or levee is constructed to such right-of-way.

History: En. Sec. 71, Ch. 129, L. 1921; Drains↪45.
re-en. Sec. 7335, R. C. M. 1921. 28 C.J.S. Drains § 40.

89-2408. (7336) Liability of district to railroad for cost of bridges, etc. Every drainage district shall be liable to the railway company whose right-of-way or yard any of its drains, ditches, or levees crosses, for the reasonable cost of the culverts and bridges made necessary by said drain, ditch, or levee crossing said right-of-way or yards, but not of more expensive character than the average other culverts and bridges on said division of railway crossing streams or ditches of approximately the same width and depth, and within a hundred miles of said district ditches.

History: En. Sec. 72, Ch. 129, L. 1921; Drains↪60.
re-en. Sec. 7336, R. C. M. 1921. 28 C.J.S. Drains §§ 34, 50.

89-2409. (7337) Railroads to permit construction of ditches—penalty. Upon receiving fifteen days' notice in writing, any railway company in whose right-of-way or yard any such drain, ditch, or levee is laid out shall open its right-of-way or yards and permit said commissioners and their contractors, agents, and employees to construct said drain, ditch, or levee, or to repair, maintain, or clean out same across said right-of-way or yards. For every day that said railroad company fails, after the end of said fifteen days, to open their said right-of-way or yard, as hereinbefore required, it shall forfeit twenty-five dollars to said drainage district, to be collected in an action, as other forfeitures are collected, or set off against any damages that have been awarded to such company. If said railway company fails to open its right-of-way or yard along the line of said drainage district, drain, ditch, or levee, the commissioners may, at any time after the expiration of said fifteen days, open such right-of-way and yard along the line of said drains, ditches, and levees, and construct the same.

History: En. Sec. 73, Ch. 129, L. 1921; 28 C.J.S. Drains §§ 40, 41.
re-en. Sec. 7337, R. C. M. 1921. Sufficiency of statutory provisions for
 notice and hearing in drainage proceed-
 ings. 84 ALR 1098.

Drains↪45, 47.

89-2410. (7338) Additional assessments, procedure to levy. If in the first assessment for construction the commissioners shall have reported to the court a smaller sum than is needed to complete the work of construction, or if in any year an additional sum is necessary to pay the lawful indebtedness of said drainage district, further or additional assessments on the land and corporations benefited, proportioned on the last assessment of benefits which has been approved by the court, shall be made by the commissioners of said drainage district under the order of the court or presiding judge thereof; provided, however, that the total assessments for original construction and any additional assessments, other than for maintenance, incidental expense, and interest on bonds, shall, in no event, exceed the total assessments of benefits as provided in section 89-2330. Notice of the hearing of the application for such additional assessment shall be published at least once each week for three consecutive weeks in one newspaper published in each county in which said lands, or any part thereof, within said district are situated; which further or additional assessment may be made payable in installments as specified in section 89-2348, and shall be

treated and collected in the same manner as the original assessments for construction confirmed by the court in said drainage district.

History: En. Sec. 74, Ch. 129, L. 1921;
re-en. Sec. 7338, R. C. M. 1921.

Necessity that additional assessment in proceeding for local improvement precede incurring liability in excess of the original assessment. 63 ALR 1179.

See 48 Am. Jur. 688, Special or Local Assessments, §§ 147 et seq.

89-2411. (7339) Omissions—how corrected. Omission to assess benefits, or to assess for construction, or to make additional assessments, or to make assessment for repairs, or to award damages to any one or more tracts of land or easements in a drainage district, or to assess benefits, or to assess for construction, or to assess for repairs, or to make additional assessments against any corporation which should have been assessed, shall neither affect the jurisdiction of the court to confirm the report nor to render the benefits assessed, or the assessments for construction, or additional assessments, or assessments for repairs against other lands, or assessments against any corporation voidable, but the commissioners of said drainage district shall thereafter, as soon as they discover the omission, or as soon as notice thereof, either agree with the omitted parties upon the proper assessments and award the damages or assess such benefits, make such assessments for construction and make such additional assessments against the omitted lands and corporations, and award such damages as shall be just, and report the facts, together with such assessments and awards, to the court.

History: En. Sec. 75, Ch. 129, L. 1921; Drains 56-61, 82, 83.
re-en. Sec. 7339, R. C. M. 1921. 28 C.J.S. Drains §§ 34, 50, 76.

89-2412. (7342) Illegal assessments—costs—how defrayed. In case the court decides that any land should not have been assessed for drainage purposes, or that any assessment is void, the commissioners of the district shall levy an additional assessment on all of the assessable lands, irrigation ditches, railroads, corporations and individual owners, based on the last assessment of the district approved by the court, sufficient to pay the sum lost to the district by reason of such void assessment, or shall pay such sum out of the general fund of the district.

History: En. Sec. 78, Ch. 129, L. 1921; Ch. 109, L. 1923; amd. Sec. 6, Ch. 169,
re-en. Sec. 7342, R. C. M. 1921; amd. Sec. 2, L. 1929.

CHAPTER 25

DRAINAGE DISTRICTS—BONDS—REFUNDING INDEBTEDNESS

Section 89-2501. Borrowing money—procedure to issue notes or bonds.
89-2502. Refunding indebtedness of district.

89-2501. (7343) Borrowing money—procedure to issue notes or bonds.

(1) The commissioners may borrow money not exceeding the amount of assessment for the cost of construction and additional assessments, as provided in section 89-2350, unpaid at the time of borrowing, for the construction or repair of any work which they shall be authorized to construct or repair, or for the payment of any indebtedness which they may have lawfully incurred, and may issue notes or negotiable coupon bonds on the district,

bearing interest at a rate not to exceed six per centum per annum, payable semi-annually and not running beyond one year after the payment of the last installment of the assessment, on account of which money is borrowed, shall fall due.

(2) Before the issuance of said notes or bonds, the commissioners shall pass a resolution providing for the issuance of such notes or bonds, which said resolution shall fix the rate of interest which said notes or bonds shall bear, not exceeding six per centum per annum, payable semi-annually, the time of payment and, if redeemable before maturity, the date thereof, and shall prescribe the denominations, not exceeding one thousand dollars, and form thereof, and may provide that both the principal and interest of said notes and bonds shall be payable at some convenient banking house, or trust company's office, to be named in said notes or bonds; such notes or bonds shall bear the signature of the president of the drainage district and shall be signed by the secretary of such drainage district, and the coupons attached to the notes or bonds shall be signed by the president and secretary; provided, the facsimile signatures of the president and secretary may be affixed to the coupons only when so recited in the notes or bonds, and the corporate seal of the drainage district shall be affixed to each of the notes or bonds.

(3) Upon execution, the notes or bonds shall be deposited with the county treasurer, who shall register the same in a book for that purpose, which shall show the number and amount of each note or bond, its date, the date payable and redeemable, where payable, the person to whom issued, and upon sale of the said notes or bonds, the county treasurer shall deliver the same to the person or persons to whom sold, upon their making payment for the same; said notes or bonds may be sold by the commissioners at either public or private sale, either with or without advertisement as they may deem it to the best interests of the district; said notes or bonds shall not be sold at less than ninety per cent. of their face value; said notes or bonds shall not be held to make the commissioners personally liable, but shall constitute a lien upon the assessments for the repayment of the principal and interest of such notes or bonds.

(4) In case any moneys derived from bonds sold to pay for the original construction of said improvement, now or hereafter, remains on hand after the work is completed in original construction, and paid for, and not raised for damages unpaid for, such residue may be used in the maintenance and repair, as in this act provided before making assessments for such maintenance and repair.

History: En. Sec. 79, Ch. 129, L. 1921;
re-en. Sec. 7343, R. C. M. 1921.

Sale of public bonds at less than par or face value. 91 ALR 7.

Drains—18.

28 C.J.S. Drains § 12.

43 Am. Jur. 261, Public Securities and Obligations.

Priority as between successive issues of obligations of permanently organized local improvement district. 99 ALR 1488.

89-2502. (7344) Refunding indebtedness of district. And the court may, on the petition of the commissioners, authorize them to refund any lawful indebtedness of the district by taking up and canceling all of its outstanding notes and bonds, as fast as they become due, or before, if the

holders thereof will surrender the same, and issuing in lieu thereof new notes or bonds of such district, payable in such longer time as the court shall deem proper, not to exceed in the aggregate the amount of all notes and bonds of the district then outstanding, and the unpaid accrued interest thereon, and bearing interest not exceeding six per cent per annum.

History: En. Sec. 80, Ch. 129, L. 1921;
re-en. Sec. 7344, R. C. M. 1921.

CHAPTER 26

DRAINAGE DISTRICTS—PROCEDURE TO BRING BENEFITED LANDS INTO DISTRICT

Section 89-2601. Benefited lands not assessed, procedure to assess.

89-2601. (7364.1) Benefited lands not assessed, procedure to assess. Whenever any lands, from which surface or seepage water enters any drain, or any lands upon which or through which surface or seepage water has been prevented from flowing because of the construction of any drain, have not been included within the drainage district which constructed such drains or drain, or the owner of any irrigation ditch or canal, from which water seeps, drains or wastes to, upon or through lands included within a drainage district, has not been assessed for the cost of construction of the drainage system of said drainage district, whether constructed before or after the passage of this act, the commissioners of such district may report said facts to the court and ask that said lands, describing them, be brought into said district and assessed for their proportionate share of the cost of the drainage system of said drainage district and ask that the owner of any such irrigation ditch or canal be assessed its proportionate share of the costs of construction of such drainage system. Thereupon the same proceedings shall be had to determine the proper assessments, if any, to be levied against said lands and the owner of such irrigation ditch or canal to aid in payment of costs of construction as set out in sections 89-2806 to 89-2811 for the determination and levy of assessments against drained lands, outside of drainage district receiving benefits from the drainage of said districts.

History: En. as Sec. 7364-A, by Sec. 7, 17 Am. Jur. 820, Drains and Sewers, § 69, Ch. 169, L. 1929.

CHAPTER 27

DRAINAGE DISTRICTS—CONTINUATION AND ALTERATION OF EXISTING DISTRICTS

- Section 89-2701. Continuation of existing districts.
89-2702. Alterations or additions to system—petition required, contents of.
89-2703. Hearing—notice and service.
89-2704. Objections—dismissal of petition—procedure at hearing.
89-2705. Appeals—conclusiveness of court's order—assessments.
89-2706. Exclusion of lands from drainage districts—how.
89-2707. Court action—parties.
89-2708. Complaint, contents of.
89-2709. Summons.
89-2710. Service of summons.
89-2711. Rules of practice applicable.

89-2712. Court order excluding lands.

89-2713. Appeals.

89-2701. (7364.2) Continuation of existing districts. All drain districts of the state of Montana, organized prior to the enactment of sections 89-2201 to 89-2502 and sections 89-2801 to 89-2820, inclusive, and continued in existence pursuant to section 89-2820 shall continue their existence as drain districts under and pursuant to all of the provisions of said sections and the commissioners of such drain districts shall have all the power and authority conferred by said sections upon the commissioners of drainage districts organized under such sections.

History: En. as Sec. 7364-B, by Sec. 2,
Ch. 97, L. 1931.

Drains 13.

28 C.J.S. Drains §§ 6, 21, 22.

89-2702. (7364.3) Alterations or additions to system—petition required, contents of. Whenever, in the judgment of the commissioners of any drain district or drainage district, it is necessary or will be beneficial to such district to make any alteration and/or any addition to the drainage system of such district, they shall file a petition with the clerk of the court having jurisdiction of such district, in which shall be stated the proposed alteration of and/or the proposed addition to the drainage system of said district, the necessity therefor and the probable cost of making such alteration and/or addition.

History: En. as Sec. 7364-C, by Sec. 2,
Ch. 97, L. 1931.

28 C.J.S. Drains § 45.

17 Am. Jur. 793, Drains and Sewers,
§§ 25, 26.

Drains 50.

89-2703. (7364.4) Hearing—notice and service. Upon the filing of such petition a judge of said district court shall set the same for hearing and direct the clerk of such court to give notice thereof. Such notice shall contain a concise statement of the proposed alteration and/or addition and the estimated cost thereof, which notice must be served and published at least twenty (20) days before the date fixed for such hearing. Service of such notice shall be made by registered mail, addressed to each landowner and corporation that may be liable for the payment of any portion of the cost of making such alteration and/or addition, at his or its post office address, if the same can be ascertained by the exercise of due diligence, and such notice shall be published once a week for twenty (20) days prior to such date in some newspaper published in the county where said court is held, to be designated in the order fixing the date for such hearing; provided, however, that if all interested landowners and corporations are so served, such notice need not be published.

History: En. as Sec. 7364-D, by Sec. 2,
Ch. 97, L. 1931.

89-2704. (7364.5) Objections—dismissal of petition—procedure at hearing. Any such landowner or corporation may at any time prior to five (5) days before the date fixed for such hearing file his or its objections to such petition. A copy of such objections shall be delivered to the attorney for said commissioners, if they have an attorney of record, or to the chairman of the board of commissioners of said district, if there be no such attorney of record, prior to filing the original thereof with the clerk of said

court. If objections are made and filed by the owners of at least fifty per centum (50%) in area of the lands in said district, said petition shall be dismissed and no further proceedings had thereon. If the owners of less than fifty per centum (50%) in area of the lands in said district object to such petition, then, on the date fixed for such hearing, or upon any day to which such hearing may be adjourned, the court having jurisdiction will hear testimony in support of said petition and in opposition thereto, and after such hearing shall determine whether the proposed alteration and/or addition are necessary, whether they will be beneficial to said district and improve the drainage system thereof, and either approve or deny such petition or modify and change the alteration and/or addition proposed. So far as possible, such hearing shall be conducted as other hearings and trials in the district courts of the state of Montana, and the laws of the state of Montana with reference to hearings and trials, so far as applicable, shall govern in the conduct of such hearings.

History: En. as Sec. 7364-E, by Sec. 2,
Ch. 97, L. 1931.

89-2705. (7364.6) Appeals—conclusiveness of court's order—assessments. Any party interested in such hearing, deeming himself aggrieved by the order of the court thereon, may appeal from such order to the supreme court of Montana within thirty (30) days after the entry of such order. If no such appeal is taken within the time limited, the order of the court made upon such hearing will be final and conclusive. If any such alterations and/or additions are authorized by such order, the same shall be made by the commissioners of said district and the cost thereof apportioned in accordance with the last assessment roll of any such drain district or in accordance with the last assessments of any such drainage district confirmed by the court.

History: En. as Sec. 7364-F, by Sec. 2,
Ch. 97, L. 1931.

89-2706. Exclusion of lands from drainage districts—how. Any lands within a drainage district, which district is not bonded or indebted and which lands have not been, and will not, in the future, be benefitted by the drainage system of the said district and which lands do not contribute water to seep other lands in the district, may be excluded or eliminated from said district by an order of the district court of the county wherein the said lands are situate upon the proceedings hereinafter set forth being had.

History: En. Sec. 1, Ch. 155, L. 1941.

89-2707. Court action—parties. An action for the exclusion of lands from any such drainage district may be brought in the district court of the county wherein said lands are situated by the owner or owners in fee of said lands, who shall be designated as the plaintiff or plaintiffs, and in said action the members of the board of drainage commissioners of said drainage district shall be made defendants.

History: En. Sec. 2, Ch. 155, L. 1941;
amd. Sec. 1, Ch. 196, L. 1943.

89-2708. Complaint, contents of. Said action shall be commenced by filing in the office of the clerk of the district court a complaint which must contain:

1. The title of the action, the name of the court and the county in which the action is brought, and the names of the parties to the action;

2. A statement of the facts constituting the cause of the action, in ordinary and concise language;

3. A demand for the relief which the plaintiff claims. The complaint shall be verified in the same manner as complaints in other civil actions.

History: En. Sec. 3, Ch. 155, L. 1941.

89-2709. Summons. Upon the filing of the complaint the clerk of the court shall issue a summons which shall contain, in addition to the matters specified in section 93-3003, a brief statement of the relief demanded and a description of the lands sought to be excluded from the drainage district.

History: En. Sec. 4, Ch. 155, L. 1941.

89-2710. Service of summons. The summons shall be served upon the president and secretary of the board of drainage commissioners and such service shall be deemed as service upon the drainage district.

History: En. Sec. 5, Ch. 155, L. 1941;
amd. Sec. 2, Ch. 196, L. 1943.

89-2711. Rules of practice applicable. The same rules relative to the filing of demurrers, answers and replies which now exist relative to other causes of action affecting the title to real property shall apply in actions to exclude lands from a drainage district, and all issues arising may be tried by the court without a jury.

History: En. Sec. 6, Ch. 155, L. 1941.

89-2712. Court order excluding lands. If the issue shall be found in favor of the plaintiff the court may make its order describing the lands to be excluded from the district and a certified copy of the same shall be filed in the office of the county recorder of the county wherein the lands are situate, and from and after the date of such order the said lands shall no longer be liable for any assessment levied by the district against the lands excluded.

History: En. Sec. 7, Ch. 155, L. 1941.

89-2713. Appeals. Appeals may be taken from the orders and judgments of the district court to the supreme court of the state of Montana, in the same manner as appeals in other causes of action affecting the title to real property.

History: En. Sec. 8, Ch. 155, L. 1941.

CHAPTER 28

DRAINAGE DISTRICTS—MISCELLANEOUS PROVISIONS

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| Section | 89-2801. Contracts—how let—advertisement. |
| | 89-2802. Interest of commissioners in contracts forbidden. |
| | 89-2803. Payment or tender of damages—deposit with clerk of court. |
| | 89-2804. Drains—how laid out. |
| | 89-2805. Procedure to bring other drained lands into district. |
| | 89-2806. Same—order to show cause. |

- 89-2807. Same—protest against confirmation of report—trial of issues.
- 89-2808. Same—findings of court.
- 89-2809. Same—order to be conclusive—appeals.
- 89-2810. Assessments against annexed lands.
- 89-2811. Confirmation of report—procedure.
- 89-2812. Court supervises commissioners—regulation of bonds.
- 89-2813. Assessments to have effect of judgment—how collected.
- 89-2814. Change in assessments not to affect bonds.
- 89-2815. Presumption as to regularity of acts of commissioners—burden of proof.
- 89-2816. Waiver of defective service.
- 89-2817. Landowners may agree to omitted assessments.
- 89-2818. Construction of act.
- 89-2819. Assessments not to be obstructed by preliminary defects.
- 89-2820. Repealing clause—exceptions.

89-2801. (7345) Contracts—how let—advertisement. In all cases where the work to be done at any one time under the direction of the commissioners shall, in their opinion, cost to exceed twenty-five hundred dollars, the same shall be let to the lowest responsible bidder, and the commissioners shall advertise for sealed bids, by notice published in some newspaper published in the county in which the petition is filed, and may advertise in one or more newspapers published elsewhere. If there be no newspaper published in the county in which the petition is filed, they shall advertise in some newspaper published in an adjoining county, which said notice shall particularly set forth the time and place when and where the bids advertised will be opened, the kind of work to be let, and the terms of payment. Said commissioners may continue the letting from time to time, if in their judgment the same shall be necessary, and shall reserve the right to reject any and all bids.

History: En. Sec. 81, Ch. 129, L. 1921;
re-en. Sec. 7345, R. C. M. 1921.

28 C.J.S. Drains §§ 43, 48.
See generally, 43 Am. Jur. 737, Public
Works and Contracts.

Drains 49, 54.

89-2802. (7346) Interest of commissioners in contracts forbidden. And they shall not, during their term of office, be interested, directly or indirectly, in any contract for the construction of any drain, ditch, levee, or other work in such drainage district or in the sale of materials therefor, or in the wages of or supplies for men or teams employed on any such work in said district.

History: En. Sec. 82, Ch. 129, L. 1921;
re-en. Sec. 7346, R. C. M. 1921.

89-2803. (7347) Payment or tender of damages—deposit with clerk of court. The damages allowed to the owners of lands shall be paid or tendered before the commissioners shall be authorized to enter upon the lands, for damage to which the award is made, for the construction of any drains, ditches, or levees proposed thereon. If the owner is unknown or there shall be a contest in regard to the ownership of the land, or the owner will not receive payment, or there exists a mortgage or other lien against the same, or the commissioners cannot for any other reason pay him, they may deposit the same damages with the clerk of the court, for the benefit of the owner or parties interested, to be paid or distributed as the court shall direct, and such payment shall have the same effect as the tender to and acceptance of the damages awarded by the true owner of the land.

This section shall not, however, prevent said commissioners, their agents, servants, and employees going upon said lands to do any and all work found necessary prior to making their assessment of benefits and award of damages, and the trial on their report thereof.

History: En. Sec. 83, Ch. 129, L. 1921;
re-en. Sec. 7347, R. C. M. 1921.

Operation and Effect

The fact that the drainage statute by this section permits the commissioners to go upon a land owner's property for the purpose of necessary investigation to determine the special benefits received or damages suffered by it, in advance of an award, does not render it obnoxious to the

constitutional provision that private property shall not be taken or damaged for public use without compensation having been first made to or paid into court for the owner. In re Valley Center Drain District, 64 M 545, 548 et seq., 211 P 218.

Drains↪56-58.

28 C.J.S. Drains § 50.

17 Am. Jur. 814, Drains and Sewers, § 59.

89-2804. (7348) Drains—how laid out. When practicable, said drains herein provided for shall be laid out and constructed on the side of public highways or along natural water courses.

History: En. Sec. 84, Ch. 129, L. 1921;
re-en. Sec. 7348, R. C. M. 1921.

Drains↪41.

28 C.J.S. Drains § 39.

17 Am. Jur. 810, Drains and Sewers, § 53.

89-2805. (7349) Procedure to bring other drained lands into district. Whenever any drained lands outside a drainage district are receiving the benefits of the drains of said district, by direct or indirect, natural or artificial connection therewith, the commissioners of said district may report said facts to the court and ask that said lands, describing them, be brought into said district and assessed for the benefits by them received from the drains, ditches, or levees of said district.

History: En. Sec. 85, Ch. 129, L. 1921;
re-en. Sec. 7349, R. C. M. 1921.

Drains↪15, 83.

28 C.J.S. Drains §§ 7, 8, 10, 76.

17 Am. Jur. 810, Drains and Sewers, § 54.

89-2806. (7350) Same—order to show cause. Upon the filing of said report the court shall order the owners of such lands to be notified of the filing of said report and the contents thereof, and shall require such owners to show cause at a time and place therein fixed, not less than twenty days thereafter, why their said lands should not be brought into said district and assessed for said benefits.

History: En. Sec. 86, Ch. 129, L. 1921;
re-en. Sec. 7350, R. C. M. 1921.

89-2807. (7351) Same—protest against confirmation of report—trial of issues. At the time and place fixed for hearing said report any of said land-owners may appear and remonstrate against the confirmation of said report. All remonstrances shall be in writing, verified, and shall set forth the facts on which they are based. All issues arising on said report shall be tried by the court without a jury.

History: En. Sec. 87, Ch. 129, L. 1921;
re-en. Sec. 7351, R. C. M. 1921.

89-2808. (7352) Same—findings of court. If the court shall find that said lands or any of them are receiving the benefits of any such drain, ditch, or levee, the court shall so find in writing, and shall order said lands to be

annexed to and made a part of said district, and benefits to be assessed against the same by the commissioners of said district.

History: En. Sec. 88, Ch. 129, L. 1921;
re-en. Sec. 7352, R. C. M. 1921.

References

In re Valley Center Drain District, 64 M 545, 550, 211 P 218.

89-2809. (7353) Same—order to be conclusive—appeals. Said order shall be final and conclusive unless appealed from to the supreme court within thirty days from the date of entry thereof.

History: En. Sec. 89, Ch. 129, L. 1921;
re-en. Sec. 7353, R. C. M. 1921.

89-2810. (7354) Assessments against annexed lands. Said commissioners shall, after the time for appeal is past, assess against each parcel, tract, and easement of and said annexed lands reasonable and just benefits, and shall assess against said lands for construction and repairs such sums as shall be just. If lands similarly situated and benefited are found in said district, the annexed lands shall be assessed a like sum of benefits and damages as said lands in the said district to which they are sought to be annexed, and a sum for construction of said work which shall be equal to all sums assessed for the complete construction of the drainage system in the district to which they are sought to be annexed against lands having the same assessment of benefits in said district.

History: En. Sec. 90, Ch. 129, L. 1921;
re-en. Sec. 7354, R. C. M. 1921.

References

In re Valley Center Drain District, 64 M 545, 550, 211 P 218.

17 Am. Jur. 816, Drains and Sewers, §§ 63 et seq. See generally, 48 Am. Jur. 555, Special or Local Assessments.

Validity of rule of assessment for drainage improvement. 2 ALR 625.

Loss of right to contest an assessment in drainage proceedings. 9 ALR 634, 842.

Assessment of right of way other than that of railroad or street railway for street or local improvement. 58 ALR 127.

Failure of property owner to avail himself of remedy provided by statute as precluding attack based on improper inclusion of property in, or exclusion of property from, assessment. 100 ALR 1292.

Right of landowner to recover back benefit assessments, upon ground of abandonment of improvement project. 145 ALR 1129.

89-2811. (7355) Confirmation of report—procedure. The commissioners shall file their said report and assessments in court; the court shall, by order, require said owners to show cause at a time and place therein fixed, not less than twenty days after the service of said order, why said report and assessments should not be confirmed. And on the hearing of said order to show cause, if a jury trial is demanded, the court shall frame issues on benefits and damages and impanel a jury or adjourn the hearing thereon until some term of court when a jury is in attendance and take the verdict of a jury on such issues. All other issues arising on said report shall be tried by the court. The court shall order all necessary amendments of said report and make written findings of fact, and when said report is amended shall by order confirm the same.

History: En. Sec. 91, Ch. 129, L. 1921;
re-en. Sec. 7355, R. C. M. 1921.

References

In re Valley Center Drain District, 64 M 545, 549, 211 P 218.

89-2812. (7356) Court supervises commissioners—regulation of bonds. The court shall at all times have supervision of said commissioners, and may

at any time require them to make a report on any matter or matters connected with their duties as commissioners, and after due hearing may remove from office any or all of said commissioners for neglect of duty or malfeasance in office, or for other good cause. The court may at any time require the commissioners to give new bonds to the clerk of the court and may fix the amount thereof, and said bonds shall be submitted to the court or the presiding judge thereof for approval.

History: En. Sec. 92, Ch. 129, L. 1921;
re-en. Sec. 7356, R. C. M. 1921.

28 C.J.S. Drains §§ 11, 12, 25, 26.
17 Am. Jur. 806, Drains and Sewers,
§ 48.

Drains—17, 18, 32.

89-2813. (7357) Assessments to have effect of judgment—how collected. Each and every sum assessed for construction, for additional assessment, or for repairs against any land or against any corporation, as soon as such assessment is confirmed by the court, shall be and is declared to be a judgment of the district court, in favor of said drainage district and against said land or corporation, and unless some other method of collection is herein provided, shall be collected in the same manner as any other money judgment is collected; provided, that whenever said assessment is a lien upon land, it shall only be collected out of said land on which it is a lien.

History: En. Sec. 93, Ch. 129, L. 1921;
re-en. Sec. 7357, R. C. M. 1921.

the budget law must be observed, under sections 16-1901 to 16-1911. State ex rel. Valley Center Drain District v. Board of County Commissioners, 100 M 581, 588, 51 P 2d 635.

Liquidated Claims Against County

Under this section assessments made by a drainage district, levied against a county for benefits accruing to its highways, are liquidated claims which do not require audit by the board of county commissioners, but in their payment, provisions of

Drains—87-91.

28 C.J.S. Drains §§ 25, 82-85.

17 Am. Jur. 827, Drains and Sewers,
§§ 81 et seq.

89-2814. (7358) Change in assessments not to affect bonds. No bonds or other money obligations issued by any drainage district shall be adversely affected by any subsequent change in assessments of benefits.

History: En. Sec. 94, Ch. 129, L. 1921;
re-en. Sec. 7358, R. C. M. 1921.

89-2815. (7359) Presumption as to regularity of acts of commissioners—burden of proof. Commissioners of drainage districts are hereby declared to be public officers. The presumption shall be in favor of the regularity and validity of all their official acts. Whenever any report of the commissioners of any drainage district or any part of any such report is contested, remonstrated against, or called in question, the burden of proof shall rest upon the contestant, remonstrant, or questioner.

History: En. Sec. 95, Ch. 129, L. 1921;
re-en. Sec. 7359, R. C. M. 1921.

Drains—18, 34; Evidence—83(2).
28 C.J.S. Drains §§ 12, 28, 31; 31 C.J.S.
Evidence §§ 138, 146.

89-2816. (7360) Waiver of defective service. In case of failure to serve any notice of any proceeding or hearing in this chapter provided for, upon any person or corporation, such person or corporation may appear in open court and waive such defect of service, or may waive it by filing in court or delivering to the commissioners of the drainage district to be filed

in court a written waiver of such defect, in which waiver said defect shall be described; which waiver shall be signed by such party and witnessed and acknowledged before a proper officer having power to take acknowledgments of deeds.

History: En. Sec. 96, Ch. 129, L. 1921;
re-en. Sec. 7360, R. C. M. 1921.

Drains↔14(2) et seq.
28 C.J.S. Drains §§ 14, 20, 21, 23 et seq.

89-2817. (7361) Landowners may agree to omitted assessments. In case of omission to assess any corporation or land that should be assessed for benefits, or construction, or repairs, or additional assessments, or to award damages, said omitted party and the owner of omitted land may in writing agree with the commissioners of said district what the assessment should be against said land, or against said corporation, or what said damages should be, and such agreement shall be acknowledged and witnessed as provided above for waivers, and be filed in the court.

History: En. Sec. 97, Ch. 129, L. 1921;
re-en. Sec. 7361, R. C. M. 1921.

Drains↔74, 76.
28 C.J.S. Drains §§ 63, 64, 68.

89-2818. (7362) Construction of act. The provisions of this act shall be liberally construed to promote the public health and welfare by reclaiming wet or overflowed lands, building embankments or levees, and the preservation of any system of drainage heretofore constructed according to law.

History: En. Sec. 98, Ch. 129, L. 1921;
re-en. Sec. 7362, R. C. M. 1921.

Drains↔2(3).
28 C.J.S. Drains § 3.

89-2819. (7363) Assessments not to be obstructed by preliminary defects. The collection of any assessments made by the commissioners for construction and confirmed by the court, shall not be restrained or obstructed by reason of any omission, imperfection, or defect in the organization of any district or in any proceedings occurring prior to the order confirming the assessments of benefits, but such order shall be conclusive as to the regularity of all proceedings relating to the assessments of benefits unless appealed from within thirty days after the entry of such order.

History: En. Sec. 99, Ch. 129, L. 1921;
re-en. Sec. 7363, R. C. M. 1921.

Drains↔39.
28 C.J.S. Drains § 36.

89-2820. (7364) Repealing clause—exceptions. Except as hereinafter provided, the provisions of chapter 147 of the session laws of 1915, chapter 144 of the session laws of 1909, sections 2403 to 2497, both inclusive, of the Revised Codes of Montana for 1907, and all acts and parts of acts in conflict herewith, are hereby repealed; provided, however, that where any drainage district shall have already been organized under the provisions of any of the laws in this section referred to, and shall have issued bonds, warrants, or other evidence of indebtedness, or entered into any contract of purchase or construction, nothing herein contained shall be construed as affecting the rights of the holders of said bonds, warrants, or other evidence of indebtedness, or of any person, persons, corporation, or association parties to such contract or contracts with said district; provided further, that within sixty days after the passage and approval of this act the drain commissioner of each county within the state shall certify to the district court of the county for which he is appointed a full, true, and correct list and description of all drainage districts theretofore created

and then existing in such county under any of the laws in this paragraph referred to, and thereupon the court or judge shall appoint three commissioners for each of said districts which then had outstanding any warrants, bonds, or other evidence of indebtedness, or which is party to any uncompleted contract with any person, persons, corporation, or association. The commissioners so appointed shall qualify and organize as a board as in this act provided, and shall thereafter carry on all the work and business of the district for which they are appointed in the same manner as is provided for the conduct of the business of drainage districts to be organized hereunder.

History: En. Sec. 100, Ch. 129, L. 1921; re-en. Sec. 7364, R. C. M. 1921.

Repealing Statutes Authorizing Taking Tax Deeds to State Lands

Held, on application for writ of injunction to prevent the issuance of a tax deed to state lands included in a drain district for nonpayment of district assessments,

that by this section, all prior acts construable as authorizing the taking of tax deeds to state lands, not used for governmental purposes, for delinquent drain district assessments were repealed, depriving counties of the right to issue tax deeds to such lands. It was revocable, not a vested right. State ex rel. Freebourn v. Yellowstone County, 108 M 21, 28, 88 P 2d 6.

CHAPTER 29

CONSERVATION OF UNDERGROUND WATER

- Section 89-2901. Landowner may sink artesian wells.
 89-2902. Casing and appliances required.
 89-2903. Log of well to be furnished state engineer.
 89-2904. Waste of artesian water forbidden—duties of state engineer.
 89-2905. Inspection, entry on premises for.
 89-2906. Penalty.
 89-2907. Information available to public.
 89-2908. Policy.
 89-2909. Artesian well defined.
 89-2910. Repealing and saving clause.

89-2901. Landowner may sink artesian wells. Any person owning land shall have the right to sink or bore an artesian well or wells on his land for the purpose of procuring water for domestic use, for the use of stock, or irrigation, or for manufacturing purposes.

History: En. Sec. 1, Ch. 218, L. 1947.

89-2902. Casing and appliances required. Every person sinking or boring an artesian well or well of more than 25 feet in depth in the state shall cause to be placed in such well a proper and sufficient casing so arranged as to prevent the cave-in of such well and to prevent the escape of water therefrom through any intervening sand and gravel stratum and shall provide the necessary valves, plugs or other appliances to prevent or control the flow of water from such well, and prevent the loss of underground water above or below the ground surface.

History: En. Sec. 2, Ch. 218, L. 1947.

89-2903. Log of well to be furnished state engineer. The driller shall keep a log of the depth, thickness, and character of the different strata penetrated, together with the data pertaining to the work; when begun; when finished; the amount, size and weight of casing, and how placed; size of drilled hole; when sealed and type of seal; name of well driller and type

of machine used; the number of cubic feet per second or gallons per minute of flow from such well when finished, above the top of casing, and pressure thereof, if same be a flowing well; all of which shall be verified under oath on forms prescribed by the state engineer and furnished to the state engineer within thirty (30) days following completion of said well, and to be made a permanent record of his office.

History: En. Sec. 3, Ch. 218, L. 1947.

Cross-Reference

Record of drilling to be kept for state board of health, secs. 69-1311 to 69-1313.

89-2904. Waste of artesian water forbidden—duties of state engineer.

No person owning or controlling an artesian well shall suffer or permit the water thereof to flow to waste except so far as reasonably necessary to prevent the obstruction thereof, or to flow or to be taken therefrom save for beneficial purposes. The state engineer shall administer this act in accordance with the rules and regulations for such administration. The state engineer may require periodical statements of water elevations. The state engineer at any time may hold a hearing on his own motion, or upon petition signed by a representative body of users of underground water in any area or sub-area, to determine whether the water supply within such area or sub-area is used in compliance with this act.

History: En. Sec. 4, Ch. 218, L. 1947.

89-2905. Inspection, entry on premises for. Any officer of the county or the state engineer or any assistant of the state engineer, the state geologist or a representative of the state board of health shall have the right to enter the premises of any such owner or proprietor, where any such well is situated, at any reasonable hour of the day, for the purpose of investigating any matters in connection with this act.

History: En. Sec. 5, Ch. 218, L. 1947.

89-2906. Penalty. Any person violating any of the provisions of this act shall be deemed guilty of misdemeanor, and on conviction thereof shall be punished as provided by law.

History: En. Sec. 6, Ch. 218, L. 1947.

89-2907. Information available to public. Such information as is required or secured under the provisions hereof shall constitute public records, and as such shall be available to the public at all reasonable times.

History: En. Sec. 7, Ch. 218, L. 1947.

89-2908. Policy. It is the intention of the legislature, by the exercise of the police powers of the state, to prevent the waste of underground waters and pollution and contamination of the underground water supply, and provide for the administration of the provisions of this act by regulations as may be necessary for the proper and orderly execution of the powers conferred by this act.

History: En. Sec. 8, Ch. 218, L. 1947.

89-2909. Artesian well defined. For the purpose of this act, an artesian well shall be defined as a well from which water flows naturally from the top of the ground.

History: En. Sec. 9, Ch. 218, L. 1947.

89-2910. Repealing and saving clause. All acts and parts of acts in conflict with the provisions of this act are hereby repealed; provided that this act shall not constitute a repeal of sections 69-1311 to 69-1313.

History: En. Sec. 10, Ch. 218, L. 1947.

TITLE 90

WEIGHTS—MEASURES AND GRADES—TIME—MONEY

- Chapter 1. Standard weights and measures—state sealer of weights and measures, 90-101 to 90-152.
2. Apples, grades and boxes, 90-201 to 90-206.
 3. Bread—standard weight and loaf, 90-301 to 90-304.
 4. Time, 90-401 to 90-407.
 5. Money of account, 90-501, 90-502.

CHAPTER 1

STANDARD WEIGHTS AND MEASURES—STATE SEALER OF WEIGHTS AND MEASURES

- Section 90-101. What are standards.
- 90-102. Unit of extension.
- 90-103. Division of the yard.
- 90-104. Rod, mile and chain.
- 90-105. Acre.
- 90-106. Unit of weights.
- 90-107. Division of a pound.
- 90-108. Unit of liquid measure.
- 90-109. Barrel and hogshead.
- 90-110. Unit of solid measure.
- 90-111. Division of the half-bushel.
- 90-112. Division of capacity for commodities sold by heap measure.
- 90-113. Heap measure.
- 90-114. Contracts construed.
- 90-115. Standard ton and bushel.
- 90-116. Penalty for disregarding standard weights.
- 90-117. Measurement of hay in the stack.
- 90-118. Standard grades for hay.
- 90-119. Stack hay not contemplated in act.
- 90-120. Penalty for violation of act.
- 90-121. Penalties.
- 90-122. Commissioner of agriculture ex officio sealer of weights and measures—deputies—bonds.
- 90-123. Supervision of inspection of weights and measures.
- 90-124. Authority of state sealer of weights and measures.
- 90-125. Duty as to visitation and inspection—certificate—acts forbidden.
- 90-126. Penalty for using false weights—seals.
- 90-127. Annual inspection of scales, etc.
- 90-128. Annual inspection of scales used for public weighing—weigh ticket to be exhibited.
- 90-129. Authority to inspect weighing devices.
- 90-130. Authority to inspect weight of commodities offered for sale.
- 90-131. Inspection of track scales for weighing in carload lots—scale platforms—penalty for short weights.
- 90-132. Weight of commodities to be indicated on containers—penalties.
- 90-133. Record of inspection—biennial report to governor.
- 90-134. Penalty for false certificates.
- 90-135. Denomination of weights to be marked thereon.
- 90-136. Prohibition of use of weights pending adjustment.
- 90-137. Condemnation of weights not standard.
- 90-138. Seizure of weights for evidence.
- 90-139. Scales and weights of itinerant vendors to be adjusted yearly.
- 90-140. Regulation of milk containers—complaints.
- 90-141. Contents of milk bottles to be shown thereon—misdemeanors.

- 90-142. Penalty for using false weights.
- 90-143. Weights stamped by sealer to be legal.
- 90-144. Penalty for short or illegal sales.
- 90-145. State sealer to establish legal tolerances.
- 90-146. Penalty for obstructing sealer.
- 90-147. State sealer to promulgate rules.
- 90-148. Penalty for violation of act.
- 90-149. Sealers ex officio deputy sheriffs.
- 90-150. Disposition of fines.
- 90-151. Penalty for violating act.
- 90-152. Proviso.

90-101. (4212) What are standards. The weights and measures accepted and used by the bureau of standards of the United States at the present time, except as hereinafter provided, are the lawful standard weights and measures of the state. The state sealer of weights and measures may establish tolerances in specifications for commercial weighing and measuring apparatus similar to the tolerances and specifications recommended by such bureau of standards. Any person violating such standards, tolerances or specifications shall be guilty of a misdemeanor.

History: En. Sec. 3120, Pol. C. 1895; re-en. Sec. 2009, Rev. C. 1907; re-en. Sec. 4212, R. C. M. 1921; amd. Sec. 1, Ch. 110, L. 1945.

Weights and Measures \hookrightarrow 3.

68 C.J. Weights and Measures § 2 et seq.

Generally, 56 Am. Jur. 1015, Weights, Measures, and Labels.

Validity of statute or ordinance as to "containers." 5 ALR 1068.

Validity of statute or ordinance requiring commodities to be sold in a specified quantity or weight. 6 ALR 429.

Construction of statute or ordinance with respect to net weight or capacity of containers. 35 ALR 785.

Validity of statute or ordinance requiring or permitting the reweighing or re-measuring of commodities sold. 35 ALR 1056.

Validity of statute or ordinance regulating weighing of merchandise sold in load or bulk lots. 116 ALR 245.

Penal offense predicated upon violation of food law as affected by ignorance or mistake of fact, lack of criminal intent, or presence of good faith. 152 ALR 798.

90-102. (4213) Unit of extension. The standard yard is the unit or standard measure of length and surface from which all other measures of extension, whether lineal, superficial, or solid, are derived and ascertained.

History: En. Sec. 3121, Pol. C. 1895; re-en. Sec. 2010, Rev. C. 1907; re-en. Sec. 4213, R. C. M. 1921. Cal. Pol. C. Sec. 3210.

90-103. (4214) Division of the yard. The yard is divided into three equal parts, called feet, and each foot into twelve equal parts, called inches; for measures of cloths and other commodities commonly sold by the yard it may be divided into halves, quarters, eighths, and sixteenths.

History: En. Sec. 3122, Pol. C. 1895; re-en. Sec. 2011, Rev. C. 1907; re-en. Sec. 4214, R. C. M. 1921. Cal. Pol. C. Sec. 3211.

90-104. (4215) Rod, mile and chain. The rod, pole, or perch contains five and a half yards, and the mile one thousand seven hundred and sixty yards; the chain for measuring land is twenty-two yards long, and divided into one hundred equal parts, called links.

History: En. Sec. 3123, Pol. C. 1895; re-en. Sec. 2012, Rev. C. 1907; re-en. Sec. 4215, R. C. M. 1921. Cal. Pol. C. Sec. 3212.

90-105. (4216) Acre. The acre for land measure must be measured horizontally, and contains ten square chains, and is equivalent in area to a

rectangle sixteen rods in length and ten in breadth; six hundred and forty acres being contained in a square mile.

History: En. Sec. 3124, Pol. C. 1895;
re-en. Sec. 2013, Rev. C. 1907; re-en. Sec.
4216, R. C. M. 1921. Cal. Pol. C. Sec. 3213.

90-106. (4217) Unit of weights. The standard avoirdupois and troy weights are the units of standards of weight from which all other weights are derived and ascertained.

History: En. Sec. 3125, Pol. C. 1895;
re-en. Sec. 2014, Rev. C. 1907; re-en. Sec.
4217, R. C. M. 1921. Cal. Pol. C. Sec. 3214.

90-107. (4218) Division of a pound. The avoirdupois pound, which bears to the troy pound the ratio of seven thousand to five thousand seven hundred and sixty, is divided into sixteen equal parts, called ounces; the hundred-weight consists of one hundred avoirdupois pounds and twenty hundred-weight constitute a ton. The troy ounce is equal to the twelfth part of the troy pound.

History: En. Sec. 3126, Pol. C. 1895;
re-en. Sec. 2015, Rev. C. 1907; re-en. Sec.
4218, R. C. M. 1921. Cal. Pol. C. Sec. 3215.

90-108. (4219) Unit of liquid measure. The standard gallon and its parts are the units or standards of measure of capacity for liquids, from which all other measures of liquids are derived and ascertained.

History: En. Sec. 3127, Pol. C. 1895;
re-en. Sec. 2016, Rev. C. 1907; re-en. Sec.
4219, R. C. M. 1921. Cal. Pol. C. Sec. 3216.

90-109. (4220) Barrel and hogshead. The barrel is equal to thirty-one and a half gallons, and two barrels constitute a hogshead.

History: En. Sec. 3128, Pol. C. 1895;
re-en. Sec. 2017, Rev. C. 1907; re-en. Sec.
4220, R. C. M. 1921. Cal. Pol. C. Sec. 3217.

90-110. (4221) Unit of solid measure. The standard half-bushel is the unit or standard measure of capacity for substances other than liquids, from which all other measures of such substances are derived and ascertained.

History: En. Sec. 3129, Pol. C. 1895;
re-en. Sec. 2018, Rev. C. 1907; re-en. Sec.
4221, R. C. M. 1921. Cal. Pol. C. Sec. 3218.

90-111. (4222) Division of the half-bushel. The peck, half-peck, quarter-peck, quart, and pint measure for measuring commodities other than liquid are derived from the half-bushel by successively dividing that measure by two.

History: En. Sec. 3130, Pol. C. 1895;
re-en. Sec. 2019, Rev. C. 1907; re-en. Sec.
4222, R. C. M. 1921. Cal. Pol. C. Sec. 3219.

90-112. (4223) Division of capacity for commodities sold by heap measure. The measures of capacity for charcoal, ashes, marl, manure, Indian corn in the ear, fruit, and roots of every kind, and for all other commodities commonly sold by heap measure, are the half-bushel and its multiples and

subdivisions; and the measures used to measure such commodities must be made cylindrical, with plane and even bottom, and must be of the following diameters from outside to outside: The bushel, nineteen and a half inches; half-bushel, fifteen and a half inches, and the peck, twelve and a third inches.

History: En. Sec. 3131, Pol. C. 1895;
re-en. Sec. 2020, Rev. C. 1907; re-en. Sec.
4223, R. C. M. 1921. Cal. Pol. C. Sec. 3220.

90-113. (4224) Heap measure. All commodities sold by heap measure must be duly heaped up in the form of a cone; the outside of the measure, by which the same are measured, to be the limit of the base of the cone, and said cone to be as high as the article will admit.

History: En. Sec. 3132, Pol. C. 1895;
re-en. Sec. 2021, Rev. C. 1907; re-en. Sec.
4224, R. C. M. 1921. Cal. Pol. C. Sec. 3221.

90-114. (4225) Contracts construed. Contracts made within this state for work to be done, or for anything to be sold or delivered by weight or measure, must be construed according to the foregoing standards.

History: En. Sec. 3133, Pol. C. 1895;
re-en. Sec. 2022, Rev. C. 1907; re-en. Sec.
4225, R. C. M. 1921. Cal. Pol. C. Sec. 3222.

90-115. (4226) Standard ton and bushel. The standard ton consists of twenty hundred pounds, but a ton of mineral coal is expressed by the conventional quantity of twenty-six and one-third bushels of seventy-six pounds each. A bushel of the articles hereinafter named consist of the number of pounds affixed to each:

Alfalfa	60	Pounds
Apples	50	"
Apples, dried	28	"
Barley	48	"
Beans	60	"
Beans, White Runner Pole.....	50	"
Beans, Broad Windsor	47	"
Beans, Lima	55	"
Blue Grass Seed	14	"
Bran	20	"
Beets	60	"
Buckwheat	52	"
Broom Corn Seed	30	"
Bromus Inermis	14	"
Corn, Shelled	56	"
Corn, Sweet	48	"
Corn, in the ear	70	"
Clover seed	60	"
Coal, Stone	80	"
Chestnuts	50	"
Cucumbers	48	"
Carrots	45	"
Cranberries	36	"
Flaxseed	56	"

Hempseed	50	"
Hickory Nuts	50	"
Hungarian grass seed	48	"
Lime	80	"
Millet	50	"
Mustard Seed	56	"
Oats	32	"
Onions	52	"
Onion, Bottom Sets	32	"
Onion, Top Sets	28	"
Orchard Grass Seed	14	"
Potatoes, Sweet	46	"
Potatoes, Irish	60	"
Peas	60	"
Peanuts	22	"
Peaches, dried	28	"
Pears	45	"
Parsnips	42	"
Plastering Hair, Unwashed	8	"
Plastering Hair, Washed	4	"
Rye	56	"
Rapeseed	50	"
Rutabagas	52	"
Rhubarb	50	"
Salt	80	"
Speltz	40	"
Sorghum Seed	57	"
Turnips	60	"
Timothy Seed	45	"
Tomatoes	50	"
Wheat	60	"
Walnuts	50	"

History: En. Sec. 3134, Pol. C. 1895; L. 1911; re-en. Sec. 1, Ch. 14, L. 1921; amd. Sec. 1, p. 137, L. 1901; re-en. Sec. re-en. Sec. 4226, R. C. M. 1921; amd. Sec. 2023, Rev. C. 1907; rep. Sec. 105, Ch. 120, 2, Ch. 110, L. 1945. Cal. Pol. C. Sec. 3223.

90-116. (4227) Penalty for disregarding standard weights. Any person, persons, company, or corporation who shall demand, exact, or take more than the prescribed number of pounds per bushel or per ton as fixed by the provisions of the preceding section, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment in the county jail not less than three nor more than six months, or by both such fine and imprisonment, in the discretion of the court.

History: En. Sec. 3134, Pol. C. 1895; amd. Sec. 1, p. 137, L. 1901; re-en. Sec. 2023, Rev. C. 1907; rep. Sec. 105, Ch. 120, L. 1911; re-en. Sec. 2, Ch. 14, L. 1921; re-en. Sec. 4227, R. C. M. 1921. Weights and Measures ~~9~~ 9. 68 C.J. Weights and Measures § 17 et seq.

90-117. (4228) Measurement of hay in the stack. Hereafter unless otherwise agreed to between the contracting parties, the following shall con-

stitute the legal measurement for hay in stack in the state of Montana: Four hundred twenty-two cubic feet shall constitute a ton of clean, native, blue joint hay, after thirty days and up to three months settlement in stack; when the same shall have been in the stack three months, or over, three hundred and forty cubic feet shall be considered a ton. Five hundred twelve cubic feet shall constitute a ton of alfalfa or rough slough grass, after the same shall have been in the stack thirty days or more and up to one year. Four hundred and fifty cubic feet shall constitute a ton of clean timothy and clover, after the same shall have been in the stack thirty days or more and up to one year. As to all other kinds of hay, five hundred and twelve cubic feet shall constitute a ton after the same shall have been in the stack sixty days or more and up to one year. For making measurements of hay in stack, the following is hereby made the legal method of measurement, to-wit: The width and length of the stack shall be measured, and the distance from the ground against one side of the stack, to the ground against the other side of the stack, directly over and opposite, shall be taken in linear feet and inches, and then the width shall be subtracted from the measurement over the stack, as above indicated, the result divided by two, and the result so obtained multiplied by the width, and the result thus obtained multiplied by the length, which will give the number of cubic feet contained in the stack, and the tonnage shall thereupon be determined by dividing the total number of cubic feet by the number of cubic feet allowed under the provisions of this act for a ton.

History: En. Sec. 1, Ch. 91, L. 1907; Ch. 74, L. 1921; re-en. Sec. 4228, R. C. M. re-en. Sec. 2024, Rev. C. 1907; amd. Sec. 1, 1921.

90-118. (4229) Standard grades for hay. There is hereby created, fixed and established a standard grade for certain species of hay sold or offered for sale within the state of Montana; the standard grade of the hereinafter enumerated species of hay shall be as follows, provided, however, that if the federal grades on hay are established in conflict with any of the following grades, then the federal grade shall govern and become the Montana standard grade:

No. 1 timothy hay—Shall be timothy with not more than one-eighth ($\frac{1}{8}$) mixed with clover or other tame grasses, may contain some brown blades, properly cured, good color and sound.

No. 2 timothy hay—Shall be timothy not good enough for No. 1, not over one-fourth ($\frac{1}{4}$) mixed with clover or other tame grasses, fair color and sound.

No. 3 timothy hay—Shall include all timothy not good enough for other grades, and sound.

Light clover mixed hay—Shall be timothy mixed with clover. The clover mixture not over one-third ($\frac{1}{3}$), properly cured, sound and of good color.

No. 1 clover mixed hay—Shall be timothy and clover mixed with at least one-half ($\frac{1}{2}$) timothy, good color, and sound.

No. 2 clover mixed hay—Shall be timothy and clover mixed, with at least one-fourth ($\frac{1}{4}$) timothy, and reasonably sound.

No. 1 clover hay—Shall be medium clover, not over one-twentieth ($\frac{1}{20}$ th) other grasses, properly cured, and sound.

No. 2 clover hay—Shall be clover, and sound and not good enough for No. 1.

Sample hay—Shall be sound, mixed, grassy, threshed, or hay not covered by other grades.

No grade hay—Shall include all hay, musty or in any way unsound.

Choice prairie hay—Shall be upland hay of bright, natural color, well cured, sweet, sound and may contain three per cent. weeds.

No. 1 prairie hay—Shall be upland and may contain one-quarter ($\frac{1}{4}$) midland, both of good color, well cured, sweet, sound and may contain eight (8) per cent. weeds.

No. 2 prairie hay—Shall be upland, of fair color, and may contain one-half ($\frac{1}{2}$) midland, both of good color, well cured, sweet, sound and may contain twelve and one-half ($12\frac{1}{2}$) per cent. of weeds.

No. 3 prairie hay—Shall include hay not good enough for other grades, and not caked.

No. 1 midland hay—Shall be midland hay of good color, well cured, sweet, sound and may contain three (3) per cent. weeds.

No. 2 midland hay—Shall be of fair color or slough hay of good color, and may contain twelve and one-half ($12\frac{1}{2}$) per cent. of weeds.

No. 1 mixed hay—Shall be hay of the different grasses, of good color, properly cured, sweet and sound.

No. 2 mixed hay—Shall be hay of the different grasses, not good enough for No. 1, of fair color, properly cured, sweet and sound.

No. 3 mixed hay—Shall be hay of the different grasses not good enough for the other grades, properly cured, sweet and sound.

Packing hay—Shall include all wild hay not good enough for other grades and not caked.

Sample prairie hay—Shall include all hay not good enough for other grades.

Choice alfalfa—Shall be reasonably fine, leafy alfalfa, of bright green color, properly cured, sound and sweet.

No. 1 alfalfa—Shall be reasonably coarse alfalfa, of a bright green color, or reasonably fine leafy alfalfa of a good color and may contain two (2) per cent. of foreign grasses, and if baled, five (5) per cent. of air-bleached hay on outside of bale allowed, but must be sound.

Standard alfalfa—May be of green color of coarse or medium texture, and may contain five (5) per cent. foreign matter; or it may be of green color, of coarse or medium texture, twenty (20) per cent. bleached, and two (2) per cent. foreign matter; or it may be of greenish cast, of fine stem and clinging foliage, and may contain five (5) per cent. foreign matter. All to be sound and sweet.

No. 2 alfalfa—Shall be any sound and sweet alfalfa, not good enough for standard, and may contain ten (10) per cent. foreign matter.

No. 3 alfalfa—May contain twenty-five (25) per cent. stack spotted hay, but must be dry and not contain more than eight (8) per cent. of foreign matter; or it may be of a green color and may contain fifty (50) per cent. of foreign matter; or it may be set alfalfa and may contain five (5) per cent. foreign matter.

No grade alfalfa—Shall include all alfalfa not good enough for No. 3.

Choice blue joint hay—Shall be reasonably fine, of bright green color, properly cured, with not more than one-eighth ($\frac{1}{8}$) of bright, sound timothy, well baled.

No. 1 blue joint hay—Shall be blue joint, with not more than one-eighth ($\frac{1}{8}$) of foreign grasses, bright green color, sound and well baled.

No. 2 blue joint hay—Shall be blue joint, not good enough for either choice or No. 1, may contain one-fourth ($\frac{1}{4}$) foreign grasses, and may contain twenty-five (25) per cent. stack spotted hay.

No. 1 millet hay—Shall be millet of good color, not over-ripe, properly cured and shall be sweet, sound and well baled.

No. 2 millet hay—Shall be millet of fair color, properly cured, sweet and well baled.

No. 3 millet hay—Shall be millet not good enough for the other grades, properly cured and well baled.

History: En. Sec. 1, Ch. 140, L. 1921; Sales $\text{C}\text{--}48\frac{3}{4}$.
re-en. Sec. 4229, R. C. M. 1921. 36 C.J.S. Food, § 15.

Cross-Reference

Sale of non-standard hay prohibited, sec. 3-1806.

90-119. (4230.1) Stack hay not contemplated in act. Nothing in this act shall apply to hay in the stack.

History: En. Sec. 2, Ch. 84, L. 1935. Sales $\text{C}\text{--}48\frac{3}{4}$.
55 C.J. Sales § 11.

NOTE.—This section is probably obsolete in view of the repeal of section 4230 by Ch. 204, L. 1937.

90-120. (4232) Penalty for violation of act. Any person, firm or corporation who shall violate the provisions of this act shall be guilty of a misdemeanor, and upon conviction thereof shall be fined in an amount not less than ten dollars nor more than five hundred dollars.

History: En. Sec. 3, Ch. 140, L. 1921;
re-en. Sec. 4232, R. C. M. 1921.

90-121. (4234) Penalties. The penalties for using, marking, or stamping false weights and measures, or selling therewith, is provided for in sections 94-1901 to 94-1904.

History: En. Sec. 3136, Pol. C. 1895; **Cross-Reference**
re-en. Sec. 2026, Rev. C. 1907; re-en. Sec. Full weight of coal to be given, secs. 50-603, 84-1410, 94-1904.
4234, R. C. M. 1921.

Weights and Measures $\text{C}\text{--}10$.
68 C.J. Weights and Measures § 17 et seq.

90-122. (4235) Commissioner of agriculture ex officio sealer of weights and measures—deputies—bonds. The commissioner of agriculture is hereby declared to be and is the ex officio state sealer of weights and measures. He shall appoint as many deputy sealers of weights and measures as he may deem necessary, subject to existing laws. Each such deputy shall give a bond to the state of Montana in the sum of one thousand dollars (\$1,000.00) conditioned upon the faithful performance of his duties.

History: En. Sec. 1, Ch. 34, L. 1911; 4235, R. C. M. 1921; amd. Sec. 1, Ch. 146, amd. Sec. 1, Ch. 83, L. 1913; re-en. Sec. L. 1939.

NOTE.—Section 50-408 makes the state coal mine inspector ex officio sealer of weights and measures.

Weights and Measures—8.
68 C.J. Weights and Measures § 12 et seq.

90-123. (4236) Supervision of inspection of weights and measures. Said state sealer of weights and measures shall have general supervision over the weights and measures of the state. He shall take charge of the standards of weights and measures and shall procure at the expense of the state any weights and measures that may be necessary, and shall cause them to be kept and in no case removed from a fire-proof vault, except for the purpose of certification and repairs. He shall maintain said standards in good order and shall submit them once in ten years (10) to the national bureau of standards for certification.

History: En. Sec. 2, Ch. 34, L. 1911; Ch. 19, L. 1917; re-en. Sec. 4236, R. C. M. amd. Sec. 2, Ch. 83, L. 1913; amd. Sec. 1, 1921; amd. Sec. 4, Ch. 146, L. 1939.

90-124. (4237) Authority of state sealer of weights and measures. The state sealer of weights and measures shall be authorized to perform any and all acts by this act authorized.

History: En. Sec. 3, Ch. 34, L. 1911; Ch. 19, L. 1917; re-en. Sec. 4237, R. C. M. amd. Sec. 3, Ch. 83, L. 1913; amd. Sec. 2, 1921; amd. Sec. 5, Ch. 146, L. 1939.

90-125. (4238) Duty as to visitation and inspection—certificate—acts forbidden. Said state sealer of weights and measures, or his deputies, shall visit the various counties, cities and towns in the state, and in the performance of his duties, he, or his deputies, shall inspect weights and measures and balances which are used for buying or selling goods, wares, merchandise, or other commodities, and for public weighing, and shall test or calibrate weights and measures, weighing devices or apparatus used as test standards in the state. He, or his deputies, shall, at least once a year, test all scales, weights and measures used in checking the receipts or disbursements of supplies of every state institution, and shall report in writing his findings to the executive officer of the institution concerned. The state sealer of weights and measures shall prepare a certificate of suitable size which shall be issued to the owner or person in charge after inspection, and a proper seal to be attached or affixed to all weights and measures or measuring devices so tested. Said certificates and seals shall bear the signature of the state sealer of weights and measures, or shall be signed by a deputy sealer of weights and measures. Such certificates shall be numbered in consecutive order, and shall show the date of issuance. It shall be unlawful for any person to deface, mutilate, obscure, conceal, efface, cancel or remove any such certificate, or any seal, stamp or mark provided for by this act, or cause or permit the same to be done, or to violate any of the provisions of this act, without the written consent of the state sealer of weights or that of the deputy who inspected the weighing device.

History: En. Sec. 4, Ch. 34, L. 1911; amd. Sec. 4, Ch. 83, L. 1913; re-en. Sec. 4238, R. C. M. 1921; amd. Sec. 6, Ch. 146, L. 1939; amd. Sec. 3, Ch. 110, L. 1945.

Weights and Measures—7.
68 C.J. Weights and Measures § 8 et seq.

90-126. (4240) Penalty for using false weights—seals. From and after the passage and approval of this act it shall be unlawful for any person or persons, firm, or co-partnership, corporation, or association of persons en-

gaged in the trade of buying or selling, purchasing or disposing of, or dealing in any merchandise or commodities to any person, or persons, in the state of Montana, to sell or purchase by weight or by measure, without first having had the weights and measures, scales or measuring devices used by them, or in their possession, for the purpose of determining the amount or quantity of any article or articles of merchandise, tested and a seal attached thereto by the state sealer of weights and measures, or by his deputies. Such seal shall be attached or placed in a conspicuous place upon such weighing or measuring device. Any person or persons making use of weighing devices subject to this act must report to the sealer of weights and measures or his deputies, in writing, the number and location of said weighing device and must promptly report the installation of any new weighing device. Any person or persons using any weight or measure, or scale or other measuring device after the passage and approval of this act, or annually thereafter, which has not been tested as provided by this act, shall, upon conviction thereof, be deemed guilty of a misdemeanor.

History: En. Sec. 6, Ch. 34, L. 1911; amd. Sec. 6, Ch. 83, L. 1913; re-en. Sec. 4240, R. C. M. 1921; amd. Sec. 7, Ch. 146, L. 1939.

False weights and measures, penalties, secs. 94-1901 to 94-1904, 94-35-171.

Weights and Measures 9.

68 C.J. Weights and Measures § 17 et seq.

Cross-References

False receipts by public weigher, sec. 16-1113.

90-127. (4241) Annual inspection of scales, etc. Every person or persons, firm, co-partnership or corporation engaged in the trade of buying and selling, or as a public weigher or user of weights and measures shall, at least once each year, have his weights, measures, balances and scales adjusted and sealed.

History: En. Sec. 7, Ch. 34, L. 1911; 4241, R. C. M. 1921; amd. Sec. 8, Ch. 146, amd. Sec. 7, Ch. 83, L. 1913; re-en. Sec. L. 1939.

90-128. (4242) Annual inspection of scales used for public weighing—weigh ticket to be exhibited. At least once each year, the state sealer of weights and measures, or his deputies, shall visit the places of business and enter upon the carts, wagons or vehicles then in use for the business of all persons engaged in the trade of buying and selling, or selling, who have weights, measures, or balances which have not been sealed during the current year, and try, adjust and seal the same. All drivers of vehicles used in transporting any commodity which has been weighed shall, upon demand of the sealer of weights and measures, or his deputies, exhibit for examination the weigh ticket or bill of the commodity weighed or transported, showing the weight thereof.

History: En. Sec. 8, Ch. 34, L. 1911; 4242, R. C. M. 1921; amd. Sec. 9, Ch. 146, amd. Sec. 8, Ch. 83, L. 1913; re-en. Sec. L. 1939.

90-129. (4243) Authority to inspect weighing devices. The state sealer of weights and measures, or his deputies shall have power to inspect, test, try and ascertain if they are correct, all weights, scales, beams, measures of any kind, instruments or mechanical devices for measurement, and the tools, appliances, or accessories connected with any and all of such instru-

ments or measurements, used, kept for use, sold, offered for sale, or kept for sale, or employed within the state by a proprietor, agent, lessee or employee in determining the size, quantity, extent, area or measurement of quantities, things, produce, articles for distribution or consumption, offered or submitted by such persons for sale, hire, or award. Provided also, that the state sealer of weights and measures, or his deputies, shall at least once a year and as often as may be deemed necessary, try and prove all computing scales and other devices having a device for indicating or registering the price as well as the weight of the commodity offered for sale. Computing devices, which may be used by any person at any place within this state, shall be tested as to the correctness of both weight and arithmetical values indicated by them.

History: En. Sec. 9, Ch. 34, L. 1911; 4243, R. C. M. 1921; amd. Sec. 10, Ch. 146, amd. Sec. 9, Ch. 83, L. 1913; re-en. Sec. L. 1939.

90-130. (4244) Authority to inspect weight of commodities offered for sale. The sealer of weights and measures, or his deputies, shall at irregular intervals examine all commodities sold and offered for sale and test them for correct weight, measure or count. And he, or his deputies, shall have the power to and shall, from time to time, weigh or measure packages or amounts of commodities of whatsoever kind kept for the purpose of sale, offered for sale, or sold, or in the process of delivery, in order to determine whether the same contain the quantity or amount represented and whether they are being offered for sale or sold in accordance with law and may seize for use as evidence any such amounts of commodities or package or packages which shall be found to contain a less amount than that represented. He, or his deputies, shall, for the purposes above mentioned, and in the general performance of their official duties, enter or go into or upon, with or without formal warrant, any stand, place, building, or premises, or may stop any vendor, peddler, junk dealer, coal wagon, ice wagon, or any dealer whatsoever and require him, if necessary, to proceed to some place specified by the sealer of weights and measures, or his deputies, for the purpose of making the proper tests; and in the exercise of such duties they shall have full police power to enforce any and all reasonable measures for testing such weights and measures, and also in ascertaining whether false or short weights and measures are being given in any sales or transfer of articles or merchandise taking place within the state. Whenever the state sealer of weights and measures, or his deputies, have reason to believe that any person or persons or corporation is violating the provisions of this act, or any act relating to weights and measures, they shall submit the evidence to the properly constituted authority in the county in which such violation occurs, who shall thereupon prosecute the persons alleged to have violated the provisions of this act, or any act relating to weights and measures, or such evidence may be submitted direct to the attorney general of the state, who shall have authority to prosecute such persons in the proper county.

History: En. Sec. 10, Ch. 34, L. 1911; 4244, R. C. M. 1921; amd. Sec. 11, Ch. amd. Sec. 10, Ch. 83, L. 1913; re-en. Sec. 146, L. 1939.

90-131. (4245) Inspection of track scales for weighing in carload lots—scale platforms—penalty for short weights. (a) All track scales used for

the purpose of weighing freight in carload lots within the state shall be under the control and direction and jurisdiction of the state sealer of weights and measures, and subject to inspection by him, or his deputies.

(b) The state sealer of weights and measures, or his deputies, shall have power either on their own motion or on complaint being made, to determine whether any scales are defective or inefficient, or whether the time, manner, or method of using same is unreasonable, ineffective, or unjust, and shall have power to condemn any scale found to be defective or inefficient, and prohibit the use of the same while in that condition, and to render such decision and to make such order, rule, or regulation as may be deemed necessary or advisable. No scale platform shall be allowed to extend over the manufacturer's specifications.

(c) Any person or persons who shall sell, or direct or permit any person or persons in his or their employ to sell any commodity or article of merchandise and make or give any false or short weight or measure, or any person or persons owning or keeping, or having charge of any scales or steel-yards for the purpose of weighing livestock, hay, grain, coal, or other articles, who shall report any false or untrue weight, whereby any other person or persons may be defrauded or injured, shall be deemed guilty of a misdemeanor, and shall be answerable to the party defrauded or injured in double damages.

History: En. Sec. 11, Ch. 83, L. 1913; 12, Ch. 146, L. 1939; amd. Sec. 4, Ch. 110, re-en. Sec. 4245, R. C. M. 1921; amd. Sec. L. 1945.

90-132. (4246) Weight of commodities to be indicated on containers—penalties. It shall be unlawful for any person or persons, association, or corporation, to sell or offer for sale in this state any commodity or article of merchandise in a package or container, without having such package or container labeled in plain, intelligible words and figures, with a correct statement of the net weight, measure, or numerical count of its contents, designated, where not otherwise provided, by lettering of at least 1/9 inch in height (8 point type). Provided, that nothing in this section shall prevent the sale of a commodity within the provisions of this act when such sale is made from bulk and the quantity is weighed, measured, or counted for the immediate purpose of such sale; provided, further, that nothing in this section shall apply to commodities or articles of merchandise, except milk and cream, offered for sale or sold in packages or containers at a price of ten cents (10c) or less per such package or to commodities or articles of merchandise in packages or containers which are sold by the aggregate net weight of the contents thereof.

1. It shall be unlawful for any person to sell or offer for sale in this state any commodity or article of merchandise, except by true net weight, measure, or numerical count, except where the parties otherwise agree. Contracts for work done, or anything to be sold by weight or measure, shall be construed according to the standards hereby adopted as the standards of this state, except where the parties have agreed upon any other calculations of measurement, and all statements and representations of any kind referring to the weight or measure of commodities or articles of merchandise shall be understood in the terms of the standards of weights and measures

aforesaid. It shall be unlawful for any person to sell solid substances by liquid measure.

2. It shall be unlawful for any person, in buying or selling any commodity or article of merchandise, to make or give false or short weight or measure, or to sell or offer for sale any commodity or article of merchandise less in weight or measure than he represents, or to use a weight, measure, balance or measuring device that is false and does not conform to the authorized standard for determining the quantity of any commodity or article of merchandise, or to have a weight, measure, balance, or measuring device adjusted for the purpose of giving false or short weight or measure, or to use in buying or selling of any commodity or article of merchandise a computing scale or device indicating the weight and price of such commodity or article of merchandise, upon which scale or device the graduations or indications are falsely or inaccurately placed, either as to weight or price, or to use any computing scale having a horizontal registering bar with a barrel computing device, unless such scale is adjusted to register the correct weight from all angles of vision, and the view on the customer's side shall never be, in any manner, obstructed. The selling and delivering of any commodity or article of merchandise shall be prima facie evidence of the representation on the part of the vendor that the quantity sold and delivered was the quantity bought by the vendee. There shall be taken into consideration the usual and ordinary leakage, evaporation, or waste that there may be from the time a package or container is filled by a vendor until he sells the same. A slight variation from the stated weight, measure or quantity for individual packages not to exceed three per cent is permissible; provided, that the variation is as often above as below the weight, measure or quantity stated.

3. Any person, who by himself, or his employee or as a proprietor or manager, shall refuse to exhibit any article, commodity or the container of any commodity, produce or anything being sold or offered for sale at a given weight or quantity, or ordinarily so sold, to the state sealer of weights and measures, or his deputies, for the purpose of allowing the same to be tested and proved as to the quantity contained therein as in this act provided, shall be guilty of a misdemeanor.

4. The term container used in this act is hereby defined to be ANY receptacle or carton into which a commodity is packed, or any wrappings with which any commodity is wrapped or put up for sale, or to be offered or exposed for sale. No containers, boxes, or baskets wherein food products or other commodities are packed shall have a false bottom, false side walls, false lid or covering, or be otherwise so constructed as to facilitate the perpetration of deception or fraud. The state sealer of weights and measures, or his deputies, may seize any container which facilitates the perpetration of deception or fraud. By order of a court having jurisdiction the containers seized shall be condemned and destroyed or released upon such conditions as the court in its discretion may impose, to insure against their use in violation of this section.

5. There are hereby established the following standard net weights for all berry containers, or hallowes in which strawberries, red or black raspberries, blackberries, currants, gooseberries, or any other berries are sold or offered for sale in this state:

(a) Pint hallocks or containers shall be 33.6 cubic inches in capacity and the contents thereof shall have a net minimum weight of twelve (12) ounces.

(b) Quart hallocks or containers shall be 67.2 cubic inches in capacity and contents thereof shall have a net minimum weight of twenty-four (24) ounces. The sale of, or having in possession for sale, any strawberries, red or black raspberries, blackberries, currants, gooseberries or any other berries in containers or hallocks not complying with the provisions of this act shall be a misdemeanor punishable, upon conviction, by a fine of not less than ten dollars (\$10.00), nor more than twenty-five dollars (\$25.00).

History: En. Sec. 12, Ch. 83, L. 1913; **Weights and Measures** 5, 6, 10.
re-en. Sec. 4246, R. C. M. 1921; amd. Sec. 68 C.J. **Weights and Measures** §§ 3 et
13, Ch. 146, L. 1939. seq., 16 et seq.

90-133. (4247) Record of inspection—biennial report to governor. The state sealer of weights and measures shall keep a complete record of all work done under his direction, and shall make a biennial report to the governor not later than the first of January of each year preceding the meeting of the legislative assembly.

History: En. Sec. 11, Ch. 34, L. 1911; **Weights and Measures** 8.
amd. Sec. 13, Ch. 83, L. 1913; re-en. Sec. 68 C.J. **Weights and Measures** § 12 et
4247, R. C. M. 1921; amd. Sec. 14, Ch. 146, seq.
L. 1939.

90-134. (4248) Penalty for false certificates. Any person authorized to seal weights and measures in accordance with this act who shall, without duly verifying the weights and measures or any weighing device of any person by comparison with the standards of weights and measures, stamp any such weighing device or measure, or attach thereto a seal that said weighing device or measure has been duly tested, is hereby declared, upon conviction thereof, to be guilty of a misdemeanor.

History: En. Sec. 14, Ch. 83, L. 1913;
re-en. Sec. 4248, R. C. M. 1921; amd. Sec.
15, Ch. 146, L. 1939.

90-135. (4249) Denomination of weights to be marked thereon. Every weight for use in trade, except when the small size of the weight renders it impracticable, shall have the denomination of such weight permanently marked on the top side thereof in legible figures or letters; and every measure of capacity for use in trade shall have the denomination and kind thereof permanently marked on the outside of such measure in legible figures or letters. A weight or measure not in conformity with this section shall not be sealed by the state sealer of weights and measures, or his deputies.

(a) Apothecaries and all other persons dealing in drugs, medicine and merchandise, commonly sold by apothecaries' weight or by apothecaries' liquid measure, shall at least once in two years cause such weights and measures so used to be tested and sealed by officers authorized under this act to inspect weights and measures.

History: En. Secs. 13 and 14, Ch. 34, **Weights and Measures** 6.
L. 1911; amd. Sec. 15, Ch. 83, L. 1913; re- 68 C.J. **Weights and Measures** § 16 et
en. Sec. 4249, R. C. M. 1921; amd. Sec. 16, seq.
Ch. 146, L. 1939.

90-136. (4250) Prohibition of use of weights pending adjustment. If any weights, measures, scales or balances can be readily adjusted by such means as the sealer of weights and measures, or his deputies, may have at hand, he, or they may adjust and seal them, but if they cannot be readily adjusted he, or they, shall affix to such weights, measures, scales or balances a notice forbidding their use until he, or they are satisfied they have been so adjusted as to conform with the standard. It shall be unlawful for any person to remove such notice, without the written consent of the officer affixing the same, unless proper repairs have first been made. And in case said notice is removed without such written consent, before proper repairs have been made, the owner, manager, proprietor, lessee or anyone in active control of the business in connection with which said weights, measures, scales or balances are used after such removal of said notice, shall be deemed guilty of a misdemeanor and shall be punished accordingly.

History: En. Sec. 15, Ch. 34, L. 1911; amd. Sec. 16, Ch. 83, L. 1913; re-en. Sec. 4250, R. C. M. 1921; amd. Sec. 17, Ch. 146, L. 1939; amd. Sec. 1, Ch. 27, L. 1941.

Weights and Measures 7.
68 C.J. Weights and Measures § 8 et seq.

90-137. (4251) Condemnation of weights not standard. All weights, measures, and balances which cannot be made to conform to the standard weights and measures as herein provided shall be stamped "condemned" or "C. D." by the state sealer of weights and measures, or his deputies, or the state sealer of weights and measures, or his deputies, may confiscate and seize, without warrant, any incorrect weight, measure, weighing or measuring device or part thereof which does not conform to the state standards or specifications, and which in his or their best judgment cannot be repaired. It shall be unlawful to offer or expose for sale, sell, use or possess a faulty scale, weight or measure, or any scale or measure used in buying or selling of any commodity or things and which has been rejected by the state sealer of weights and measures or his deputies. Scales commonly known as "family scales" or scales marked when sold "not legal in trade" shall not be deemed standard and shall be subject to such seizure. The state sealer of weights and measures, or his deputies, shall not be liable to the owner of the property for damages caused by such seizure. All persons owning coin weight scales shall place their name and address on the back of the scale. In all cases where inspection fees are not paid on coin weight scales, the same may be confiscated by the state sealer of weights and measures, or his deputies.

History: En. Sec. 16, Ch. 34, L. 1911; amd. Sec. 17, Ch. 83, L. 1913; re-en. Sec. 4251, R. C. M. 1921; amd. Sec. 18, Ch. 146, L. 1939; amd. Sec. 5, Ch. 110, L. 1945.

Weights and Measures 11.
68 C.J. Weights and Measures § 17 et seq.

90-138. (4252) Seizure of weights for evidence. The state sealer of weights and measures, or his deputies, may seize, without warrant, such weights, measures, or balances as may be necessary to be used as evidence in case of violation of any act relative to the sealing of weights and measures. They shall be returned to the owners or forfeited as the court may direct.

History: En. Sec. 18, Ch. 83, L. 1913;
re-en. Sec. 4252, R. C. M. 1921; amd. Sec.
19, Ch. 146, L. 1939.

Searches and Seizures 3(1).
56 C.J. Searches and Seizures § 77 et seq.

90-139. (4253) Scales and weights of itinerant vendors to be adjusted yearly. All itinerant peddlers and hawkers, using scales, balances, weights, or measures, shall take the same to the office of the state sealer of weights and measures, or his deputies, before any use is made thereof, and have the same sealed and adjusted at least once a year.

History: En. Sec. 18, Ch. 34, L. 1911;
amd. Sec. 19, Ch. 83, L. 1913; re-en. Sec.
4253, R. C. M. 1921; amd. Sec. 20, Ch.
146, L. 1939.

Weights and Measures 7.
68 C.J. Weights and Measures § 8 et seq.

90-140. (4254) Regulation of milk containers—complaints. All milk, cream, and skimmed milk shall be sold only by standard wine measure, and by or in measures, cans, jars, bottles, or other vessels or receptacles, the standard measure or capacity of which shall be the gallon containing two hundred thirty-one (231) cubic inches, the half gallon containing one-half as much as the gallon, and the quart one-fourth as much as the gallon and the pint one-half as much as the quart. Any purchaser of milk, cream or skimmed milk, having reason to believe that any measure, can, jar, bottle, or other vessel or receptacle, in which milk, cream, or skimmed milk is sold and delivered to him, is not of sufficient size or capacity to contain, by standard wine measure, the amount thereof purchased, may apply to the sealer of weights and measures, or his deputies, who shall test the capacity of the same and issue to such purchaser his certificate stating the capacity thereof; and if such capacity, according to such certificate, shall be less than the amount purchased, such purchaser may make complaint to any court having jurisdiction.

History: En. Sec. 19, Ch. 34, L. 1911;
amd. Sec. 20, Ch. 83, L. 1913; re-en. Sec.
4254, R. C. M. 1921; amd. Sec. 21, Ch. 146,
L. 1939.

Cross-Reference

Dairy products, weights and measures,
secs. 3-3432, 3-3433, 27-105.

Weights and Measures 5.

68 C.J. Weights and Measures § 3 et seq.

90-141. (4255) Contents of milk bottles to be shown thereon—misdemeanors. No person or corporation shall, after the passage of this act, sell or offer for sale within the state of Montana, any milk or cream in bottles or glass jars, unless each of said bottles or glass jars in which said milk or cream is sold or offered for sale shall have blown into it, or otherwise indelibly and permanently indicated thereon in a legible and conspicuous manner, the capacity thereof, and the state sealer of weights and measures, or his deputies, shall have the right, at any time, to examine any such bottle or glass jar, in order to ascertain whether such bottle or jar is of a capacity not less than that which it purports to be; and if any such bottle or jar is of less capacity than that which it purports to be, or if any such bottle or jar shall not have blown into it, or otherwise indelibly and permanently indicated thereon in a legible and conspicuous manner, its capacity as aforesaid, the person or corporation selling or offering for sale milk or cream in any such bottle or jar, or having in his possession any such bottle or jar, to be used or which has been used for the purpose of containing milk

or cream to be sold or offered for sale in said state of Montana shall be deemed guilty of a misdemeanor.

History: En. Sec. 20, Ch. 34, L. 1911; amd. Sec. 21, Ch. 83, L. 1913; re-en. Sec. 4255, R. C. M. 1921; amd. Sec. 22, Ch. 146, L. 1939. Construction of statute or ordinance with respect to net weight or capacity of containers. 35 ALR 785.

90-142. (4256) Penalty for using false weights. A person who uses, or has in his possession for use in trade, any weight, measure, scale, balance, steel-yard, or weighing device, which is false or incorrect, shall be guilty of a misdemeanor, and any contract made by any person based upon such false or incorrect devices shall be void and such devices shall be liable to be forfeited by any court having jurisdiction.

History: En. Sec. 21, Ch. 34, L. 1911; re-en. Sec. 22, Ch. 83, L. 1913; re-en. Sec. 4256, R. C. M. 1921; amd. Sec. 23, Ch. 146, L. 1939. Weights and Measures[Ⓒ]10. 68 C.J. Weights and Measures § 17 et seq.

90-143. (4257) Weights stamped by sealer to be legal. A weight or measure duly stamped by the state sealer of weights and measures, or his deputies, or by the national bureau of standards, shall be a legal weight or measure throughout the state, unless found to be false or incorrect, and shall not be liable to be resealed because used in any other place than that which it was originally stamped.

History: En. Sec. 22, Ch. 34, L. 1911; re-en. Sec. 23, Ch. 83, L. 1913; re-en. Sec. 4257, R. C. M. 1921; amd. Sec. 24, Ch. 146, L. 1939. Weights and Measures[Ⓒ]6. 68 C.J. Weights and Measures § 16 et seq.

90-144. (4258) Penalty for short or illegal sales. Whoever sells or offers for sale a less quantity than represented, or sells in a manner contrary to law, shall be guilty of a misdemeanor.

History: En. Sec. 23, Ch. 34, L. 1911; re-en. Sec. 24, Ch. 83, L. 1913; re-en. Sec. 4258, R. C. M. 1921; amd. Sec. 25, Ch. 146, L. 1939. Weights and Measures[Ⓒ]10. 68 C.J. Weights and Measures § 17 et seq.

90-145. (4259) State sealer to establish legal tolerances. The state sealer of weights and measures shall, after consultation with, and with the advice of the national bureau of standards, establish tolerances for use in the state of Montana, and said tolerances shall be the legal tolerances in the state of Montana.

History: En. Sec. 24, Ch. 34, L. 1911; re-en. Sec. 25, Ch. 83, L. 1913; re-en. Sec. 4259, R. C. M. 1921. Weights and Measures[Ⓒ]3. 68 C.J. Weights and Measures § 2 et seq.

90-146. (4260) Penalty for obstructing sealer. Any person who neglects or refuses to produce for the state sealer of weights and measures, or his deputies, all weights, measures, or balances in his possession and used in trade, or on his premises, or refuses to permit the said officers to examine the same, or obstructs the entry of said officers, or otherwise obstructs or hinders any official under this law shall be guilty of a misdemeanor.

History: En. Sec. 25, Ch. 34, L. 1911; re-en. Sec. 26, Ch. 83, L. 1913; re-en. Sec. 4260, R. C. M. 1921; amd. Sec. 26, Ch. 146, L. 1939.

90-147. (4261) State sealer to promulgate rules. The state sealer of weights and measures is hereby authorized to make such rules and regulations for the guidance and direction of his deputies in conformity with this act as may be proper and necessary to carry out the provisions of this act in a uniform manner. Such rules and regulations when adopted by the state sealer of weights and measures shall have the same force and effect as is provided for in this act.

History: En. Sec. 28, Ch. 34, L. 1911; re-en. Sec. 27, Ch. 83, L. 1913; re-en. Sec. 4261, R. C. M. 1921; amd. Sec. 27, Ch. 146, L. 1939.

Weights and Measures ~~8~~8.
68 C.J. Weights and Measures § 12 et seq.

90-148. (4262) Penalty for violation of act. Any person or persons violating any of the provisions of this act where no other penalty is provided shall, upon conviction thereof, be fined in a sum not less than twenty-five dollars nor more than three hundred dollars, or by imprisonment in the county jail not less than thirty nor more than ninety days.

History: En. Sec. 29, Ch. 34, L. 1911; re-en. Sec. 28, Ch. 83, L. 1913; re-en. Sec. 4262, R. C. M. 1921.

90-149. (4263) Sealers ex officio deputy sheriffs. The state sealer of weights and measures and his deputies shall be, by virtue of their respective offices, deputy sheriffs, and as such shall have power to arrest and detain any person violating the provisions of this act, without warrant.

History: En. Sec. 30, Ch. 34, L. 1911; re-en. Sec. 29, Ch. 83, L. 1913; re-en. Sec. 4263, R. C. M. 1921; amd. Sec. 28, Ch. 146, L. 1939.

Arrest ~~63~~63(2).
6 C.J.S. Arrest § 6.

90-150. (4264) Disposition of fines. All fines collected for violation of the provisions of this act shall be paid to the state treasurer for support and maintenance of the department of weights and measures. All justices of the peace and clerks of district courts who may collect any fine imposed for the violation of the provisions of this act must, not later than the fifth of each month, transmit to the state sealer of weights and measures all moneys so collected, after deducting therefrom all costs in each case, and the state sealer of weights and measures shall pay the same to the state treasurer, taking his receipt therefor.

History: En. Sec. 31, Ch. 34, L. 1911; re-en. Sec. 30, Ch. 83, L. 1913; re-en. Sec. 4264, R. C. M. 1921; amd. Sec. 29, Ch. 146, L. 1939.

90-151. Penalty for violating act. Any person violating any of the provisions of this act shall be deemed guilty of a misdemeanor and where no other penalty is herein provided, upon conviction shall be fined not more than five hundred (\$500.00) dollars.

History: En. Sec. 30, Ch. 146, L. 1939.

90-152. Proviso. Provided, however, this act shall not be construed as repealing any of the provisions of chapter 2 of Title 60.

History: En. Sec. 31, Ch. 146, L. 1939.

CHAPTER 2

APPLES, GRADES AND BOXES

Section	90-201.	Grades of apples.
	90-202.	Marking of apple containers.
	90-203.	Designation of grade of bulk apples.
	90-204.	Standard size of apple box.
	90-205.	Short boxes to be marked.
	90-206.	Penalty for violation of act.

90-201. (4265.1) Grades of apples. The standard grades of apples for the state of Montana shall be: "Extra fancy or first grade", "fancy or second grade", "C", "combination grades", and "XFFC".

(a) "Extra fancy or first grade", shall consist of apples of one variety which are mature, hand picked, clean, well formed, sound, free from bruises, limbrubs, spray burns, sunburn, russeting, drought spot, hail marks, visible water-core, broken skin, apple scab, stings, and from diseases and insect injury, except that slight blemishes shall be permitted in this grade.

(b) "Fancy or second grade" shall consist of apples of one variety which are mature, hand picked, clean, fairly well formed, sound, free from visible water-core, broken skin, and from damage caused by bruises, limbrub, spray burns, sunburn, russeting, drought spot, hail marks, apple scabs, diseases and insect injury.

(c) "C" grade shall consist of apples of one variety which are mature, hand picked, clean, not badly misshapen, sound, free from broken skin and from serious damage caused by bruises, limbrub, russeting, drought spot, hail marks, apple scab, diseases and insect injury, and must have fifteen per centum (15%) of color requirements characteristic of the variety. The word "choice" must not be used in connection with this grade.

(d) Cull apples shall consist of apples free from infection or disease or serious damage but which do not meet the requirements of extra fancy or first grade, fancy or second grade, or of "C" grade and shall be marked in block letters not less than one inch in height on both ends of box "culls".

(e) "Combination grades". When "extra fancy or first grade" and "fancy or second grade" apples are packed together, the boxes must be marked "combination extra fancy or first grade and fancy or second grade". When "fancy or second grade" and "C" grades are packed together, the boxes must be marked "combination fancy or second grade and, 'C'." Combination grades must contain at least twenty-five per centum (25%) of apples which belong to the higher grade in the combination.

(f) "XFFC" grade shall consist of "extra fancy or first grade", "fancy or second grade" and "C" grade apples packed in combination. Boxes so marked must contain at least twenty per centum (20%) of apples of "extra fancy or first grade"; fifty (50%) per centum of "fancy or second grade"; and not more than thirty per centum (30%) of "C" grade. No apples failing to meet the requirements of "C" grade shall be permitted in this grade.

(g) No apples smaller than two and one-fourth ($2\frac{1}{4}$) inches in diameter shall be permitted in any grade.

Small apples which are under size requirements as prescribed may be shipped if marked "small" in block letters not less than one inch in height

on both ends of box, provided such apples are free from insect pests and diseases.

(h) In order to provide for variations incident to commercial grading and handling a tolerance of ten per centum (10%) for a total of all defects from the standard of the grade shall be allowed.

History: En. Sec. 1, Ch. 138, L. 1931; amd. Sec. 1, Ch. 1, L. 1933; amd. Sec. 1, Ch. 39, L. 1935; amd. Sec. 1, Ch. 89, L. 1939.

Cross-Reference

Inspection of apples, sec. 3-1305.

Food 5.

36 C.J.S. Food § 15.

90-202. (4265.2) Marking of apple containers. Any box, barrel, crate or carton used in packing apples for sale shall be marked or branded in plain legible letters on one (1) end with:

a. The name of grower, or person, or firm responsible for pack, and the locality where grown or packed.

b. With the name of the variety.

c. With the grade contained therein, which must comply with the provisions of this act.

d. With the approximate number of apples contained therein, or with the net weight of contents.

History: En. Sec. 2, Ch. 138, L. 1931.

90-203. (4265.3) Designation of grade of bulk apples. Apples shipped or sold in bulk shall have two cards at least ten by twelve inches (10" x 12") in size attached to the doors of the car, or on each side of truck in which they are moved, such cards to designate the grade of the apples contained therein as specified in section 90-201, in plain legible printed letters at least two inches in height.

History: En. Sec. 3, Ch. 138, L. 1931; amd. Sec. 2, Ch. 39, L. 1935.

90-204. (4265.4) Standard size of apple box. There is hereby created and established a standard size for apple boxes for the state of Montana. The standard size of an apple box shall be of the following dimensions, when measured without distention of its parts: Depth of end, ten and one-half inches (10½"); width of end, eleven and one-half inches (11½"); length of box, eighteen inches (18") inside measurements; and representing as nearly as possible two thousand one hundred and seventy-three and one-half cubic inches (2,173½").

History: En. Sec. 4, Ch. 138, L. 1931.

Food 14.

36 C.J.S. Food §§ 22, 25.

90-205. (4265.5) Short boxes to be marked. Any box in which apples shall be packed and offered for sale that contains less than the required number of cubical inches, as prescribed in the preceding section, shall be plainly marked on one (1) side and one (1) end with the words "Short Box," or with the words or figures showing the practical relation which the actual capacity of the box bears to the capacity required by the preceding section. The marking required by this paragraph shall be in black letters of not less than one-half (½) inch in size.

History: En. Sec. 5, Ch. 138, L. 1931.

90-206. (4265.6) **Penalty for violation of act.** No person, firm, company or corporation shall sell or offer for sale or shipment within or without the state of Montana, apples branded or packed in containers in violation of the provisions of this act. Any person, firm, company or corporation who shall knowingly sell or offer for sale or shipment within or without the state of Montana, apples in violation of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not less than ten dollars (\$10.00) nor more than fifty dollars (\$50.00).

History: En. Sec. 6, Ch. 138, L. 1931;
amd. Sec. 3, Ch. 39, L. 1935.

CHAPTER 3

BREAD—STANDARD WEIGHT AND LOAF

- Section 90-301. Weight requirements for sale of bread.
90-302. Definitions—conditions under which bread may be sold.
90-303. Return or repurchase of bread prohibited.
90-304. Penalty for violation of law.

90-301. (4273) **Weight requirements for sale of bread.** From and after the passage of this act it shall be unlawful for any person or persons, association, co-partnership, or corporation to manufacture for retail or wholesale trade, or to sell bread, unless the same shall be of the following weights, which shall be net weights eight hours after baking: One pound, one and one-half pounds, two pounds, three pounds, four pounds, five pounds, six pounds, or other multiple pound weights; variation at the rate of one ounce per pound over and one ounce per pound under the above specified unit weights are to be permitted in individual loaves, but the average weight of not less than twenty-five loaves of any one unit of any one kind shall be not less than the weight prescribed for such unit, and if twin or multiple loaves are wrapped at the place where baked or sold to the consumer wrapped and undivided, the loaf must conform to the above weight requirements, and if the twin or multiple loaf is unwrapped or divided before being sold to the consumer, each unit of the loaf must conform to the above weight requirements; provided, that this act shall not apply to persons, firms, or corporations who do not hold themselves out to the public, and engaging in a general and established business of manufacturing or selling bread and bread products.

History: En. Sec. 1, Ch. 155, L. 1919; **Weights and Measures** 5.
re-en. Sec. 4273, R. C. M. 1921. 68 C.J. **Weights and Measures** § 4.
22 Am. Jur. 836, **Food**, § 44.

90-302. (4274) **Definitions—conditions under which bread may be sold.** In construing provisions of the preceding section the following definitions shall be had: A twin or multiple loaf is one that is made of two or more portions of dough baked in one pan; single units weighing less than one pound must not be baked; a manufacturer or seller of loaves of the weights prescribed may cut and sell a portion of a loaf to a consumer; bread may be sold at any time after baking, and it shall not be required that bread shall remain unwrapped for any specified length of time after baking.

History: En. Sec. 2, Ch. 155, L. 1919; Food~~§~~14.
 re-en. Sec. 4274, R. C. M. 1921. 36 C.J.S. Food §§ 22, 25.

90-303. (4275) Return or repurchase of bread prohibited. It shall be unlawful for any person or persons, association, co-partnership, or corporation engaged in the manufacture for sale, or the sale of bread, to directly or indirectly accept return of bread theretofore sold, nor repurchase the same, nor allow credit to any one for the same; nor shall any bread previously sold be exchanged for other bread.

History: En. Sec. 3, Ch. 155, L. 1919;
 re-en. Sec. 4275, R. C. M. 1921.

90-304. (4276) Penalty for violation of law. Any such manufacturer or seller violating any of the provisions herein contained shall be liable to a fine of not less than ten dollars nor more than one hundred dollars for each and every offense, and each separate sale or violation of any of the provisions of this act shall constitute a separate offense.

History: En. Sec. 4, Ch. 155, L. 1919;
 re-en. Sec. 4276, R. C. M. 1921.

CHAPTER 4

TIME

Section 90-401. Time, how computed.
 90-402. Leap-year.
 90-403. The year and its parts.
 90-404. The week.
 90-405. The day.
 90-406. "Daytime" and "nighttime" defined.
 90-407. Computation of time.

90-401. (4277) Time, how computed. Time is computed according to the Gregorian or new style; and the first of January in every year passed since seventeen hundred and fifty-two, or to come, must be reckoned as the first day of the year.

History: En. Sec. 3140, Pol. C. 1895;
 re-en. Sec. 2027, Rev. C. 1907; re-en. Sec.
 4277, R. C. M. 1921. Cal. Pol. C. Sec. 3255.

Inclusion of Sunday in computation of period within which bill must be presented to governor. 71 ALR 1363.

Time~~§~~1.
 62 C.J. Time § 7.
 52 Am. Jur. 339, Time, §§ 15 et seq.
 Computation of time allowed for approval or disapproval of bill by governor. 54 ALR 339.

Computation of statutory period with respect to bringing suit under mechanics' lien statute. 75 ALR 711.

Computation and requisites of period of notice given to terminate tenancy. 86 ALR 1346.

90-402. (4278) Leap-year. Except the year nineteen hundred, every fourth year, which, by usage in this state, is considered a leap-year, is a leap-year consisting of three hundred and sixty-six days.

History: En. Sec. 3141, Pol. C. 1895; Time~~§~~4.
 re-en. Sec. 2028, Rev. C. 1907; re-en. Sec. 62 C.J. Time § 8 et seq.
 4278, R. C. M. 1921. Cal. Pol. C. Sec. 3256.

90-403. (4279) The year and its parts. The term "year" means a period of three hundred and sixty-five days; a half-year, one hundred and eighty-two days; a quarter of a year, ninety-one days; and the added day

of a leap-year, and the day immediately preceding, if they occur in any such period, must be reckoned together as one day.

History: En. Sec. 3142, Pol. C. 1895; re-en. Sec. 2029, Rev. C. 1907; re-en. Sec. 4279, R. C. M. 1921. Cal. Pol. C. Sec. 3257.

codes, in Kelly v. Independent Publishing Co., 45 M 127, 133, 122 P 735.

References

Cited or applied as section 2029, revised

52 Am. Jur. 335, Time, §§ 9 et seq.

90-404. (4280) The week. A week consists of seven consecutive days.

History: En. Sec. 3143, Pol. C. 1895; re-en. Sec. 2030, Rev. C. 1907; re-en. Sec. 4280, R. C. M. 1921. Cal. Pol. C. Sec. 3258.

Publication on Sunday

Under this section, Sunday is a part of the week, and publication of a summons on four successive Sundays is publication "once a week for four successive weeks" as specified in section 93-3014. Such publication is therefore valid, it not being forbidden by any general common law, constitutional or statutory prohibition. State ex rel. Fisher v. District Court et al., 110 M 61, 64, 99 P 2d 211.

References

Cited or applied as section 2030, revised codes, in Smith v. Collis, 42 M 350, 359, 112 P 1070; State ex rel. Stevens v. McLeish, 59 M 527, 531, 198 P 357; Garry v. Martin, 70 M 587, 592, 227 P 573; State ex rel. Fisher v. District Court, 110 M 61, 64, 99 P 2d 211.

Time—6.

62 C.J. Time § 21 et seq.

52 Am. Jur. 337, Time, § 12.

90-405. (4281) The day. A day is the period of time between any midnight and the midnight following.

History: En. Sec. 3144, Pol. C. 1895; re-en. Sec. 2031, Rev. C. 1907; re-en. Sec. 4281, R. C. M. 1921. Cal. Pol. C. Sec. 3259.

80 M 53, 60, 257 P 1034; State ex rel. Bevan v. Mountjoy, 82 M 594, 601, 268 P 558.

References

State ex rel. St. George v. Justice Court,

Time—8.

62 C.J. Time § 26.

52 Am. Jur. 338, Time, § 13.

90-406. (4282) "Daytime" and "nighttime" defined. "Daytime" is the period of time between "sunrise" and "sunset," and "nighttime" is the period of time between "sunset" and "sunrise."

History: En. Sec. 3145, Pol. C. 1895; re-en. Sec. 2032, Rev. C. 1907; re-en. Sec. 4282, R. C. M. 1921. Cal. Pol. C. Sec. 3260.

Burglary—8.

12 C.J.S. Burglary §§ 14, 15.

90-407. (10707) Computation of time. The time in which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded.

History: En. Sec. 430, p. 130, Bannack Stat.; amd. Sec. 501, p. 233, L. 1867; re-en. Sec. 578, p. 153, Cod. Stat. 1871; re-en. Sec. 519, p. 176, L. 1877; re-en. Sec. 519, 1st Div. Rev. Stat. 1879; re-en. Sec. 536, 1st Div. Comp. Stat. 1887; amd. Sec. 3459, C. Civ. Proc. 1895; re-en. Sec. 8067, Rev. C. 1907; re-en. Sec. 10707, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 12.

dependent Publishing Co., 45 M 127, 134, 122 P 735.

Double Holidays Both Excluded

Where the limitation of time in which an act may be done falls upon the first of two consecutive holidays, both days are excluded, and the words "any act provided by law" applies to acts which may be done within a specified time, and not to acts which the law provides shall be done. Kelly v. Independent Publishing Co., 45 M 127, 135, 122 P 735.

Applied to Computation Under the Statutes in All Cases

The rule prescribed by this section is applicable to computations under the statute in all cases, whether the actions be ex contractu or ex delicto; it therefore applies to an action for libel. Kelly v. In-

Id. Two holidays, appearing in succession at the end of the time limited, are to be excluded.

Not Applicable to Time for Filing Nominating Petitions

Held, on application for writ of injunction to prevent certification of names of certain aspirants for state office as candidates to be voted on at the primary election to be held on July 17, the date fixed by law for such election, that the provision of section 23-912, as amended by Chapter 133, Laws of 1923, page 385, requiring the filing of petitions for nomination for state offices with the secretary of state "not less than forty days before the date" of the election, construed in the light of other sections of the code fixing the time within which the secretary of state shall certify the names of such candidates as in *pari materia*, is exclusive, making inapplicable the provision of this section, that the time in which any act provided by law is to be done must be computed by excluding the first day and including the last; that, forty full days being required, the date of filing must be excluded from computation and, the section providing that the filing must be done forty days before the date of the election, July 17 may not be counted; that therefore nominating petitions were required to be filed before midnight of June 6 and petitions filed on June 7 were too late and the names of the candidates therein mentioned not entitled to certification. *State ex rel. Bevan v. Mountjoy*, 82 M 594, 599, 601, 268 P 558.

Operation and Effect

Under section 93-9709, summons in an action for unlawful detainer must be served at least four days before the return day designated therein. Summons in such an action was issued out of a justice of the peace court and served on the eighth day of a certain month and made returnable on the twelfth of that month. Held, on appeal from a judgment quashing an alternative writ of prohibition attacking the jurisdiction of the justice, that the statute contemplates at least four full days before return day; that therefore in computing the time for service the return day as well as the day of service, the latter under this section, relating to computation of time generally in which an act provided by law is to be done, must be excluded; that, in the instant case, four full days from day of service, to return day had not expired and hence that the justice court did not obtain jurisdiction of the action. *State ex rel. St. George v. Justice Court*, 80 M 53, 59 et seq., 257 P 1034.

The rule declared by this section, that the time within which the law requires an act to be done shall be computed by excluding the first and including the last

day, applies to the provision of section 91-1503, that notice of application for letters of administration must be posted at least ten days before the hearing—an event; it has no application where the thing is required to be done a certain number of days before a given date. In *re Esterly's Estate*, 97 M 206, 211, 34 P 2d 539.

Recognized Prior to Enactment of This Statute

The rule of exclusion of the last day of limitation when it falls on a holiday was recognized in this jurisdiction in the case of *Schnepel v. Mellen*, 3 M 118, 126, prior to the enactment of any legislation on the subject. The purpose of the legislation was also to settle the rule in this behalf, so that a person having a right to bring an action, or to do any other act in the course of legal proceedings, might have a whole legal day at the end of the prescribed period in which to exercise his option. *Kelly v. Independent Publishing Co.*, 45 M 127, 135, 122 P 735.

When a Departure From This Rule Is Permitted

For most purposes, the law regards the day as an indivisible unit. It is only when it becomes necessary to inquire into the order of sequence of two or more events occurring on the same day, for the purpose of determining a question of priority of right, or when the computation includes only one day or less, that departure from this rule is permitted. *Harmon v. Comstock Horse & Cattle Co.*, 9 M 243, 250, 23 P 470; *Kelly v. Independent Publishing Co.*, 45 M 127, 133, 122 P 735.

References

Cited or applied as section 8067, Revised Codes, in *Smith v. Collis*, 42 M 350, 359, 112 P 1070; *McDonnell v. Huffine*, 44 M 411, 428, 120 P 792; *Abell et al. v. Bishop*, 86 M 478, 496, 284 P 525.

Time—9(1), 10(1).

62 C.J. Time § 29 et seq.

52 Am. Jur.* 339, Time, §§ 15-32.

Computation of time allowed for approval or disapproval of bill by governor. 54 ALR 339.

Inclusion of Sunday in computation of period within which bill must be presented to governor. 71 ALR 1363.

Computation of statutory period with respect to bringing suit under mechanics' lien statute. 75 ALR 711.

Computation and requisites of period of notice given to terminate tenancy. 86 ALR 1346.

CHAPTER 5

MONEY OF ACCOUNT

- Section 90-501. Money of account.
 90-502. Limitation on preceding section.

90-501. (4283) Money of account. The money of account in this state is the dollar, cent, and mill. Public accounts and all proceedings in courts must be kept and had in conformity to this regulation.

History: En. Sec. 3150, Pol. C. 1895; United States 34.
 re-en. Sec. 2033, Rev. C. 1907; re-en. Sec. 48 C.J. Payment § 20 et seq.; 59 C.J.
 4283, R. C. M. 1921. Cal. Pol. C. Sec. 3272. Statutes § 373 et seq.

90-502. (4284) Limitation on preceding section. The provisions of the preceding section do not vitiate or affect any account, charge, or entry originally made, or any note, bond, or other instrument, expressed in any other money of account; but the same must be reduced to dollars and cents in any action.

History: En. Sec. 3151, Pol. C. 1895; Bills and Notes 33 and other specific
 re-en. Sec. 2034, Rev. C. 1907; re-en. Sec. topics.
 4284, R. C. M. 1921. Cal. Pol. C. Sec. 3273. 10 C.J.S. Bills and Notes § 105.

TITLE 91

WILLS, SUCCESSION, PROBATE AND GUARDIANSHIP

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CHAPTER 1

WILLS—EXECUTION AND REVOCATION

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| | 91-141. Wills pass estate subsequently acquired. |
| | 91-142. Restriction to devise for charitable purposes. |

91-101. (6974) Who may make a will. Every person over the age of eighteen years, of sound mind, may, by last will, dispose of all of his estate, real and personal, and such estate not disposed of by will is succeeded to as provided in sections 91-401 to 91-422, being chargeable in both cases with the payment of all the decedent's debts, as provided in this Title.

History: Ap. p. Sec. 4, p. 556, Cod. Stat. 1871; en. Sec. 432, p. 349, L. 1877; re-en. Sec. 432, 2nd Div. Rev. Stat. 1879; re-en. Sec. 432, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1720, Civ. C. 1895; re-en. Sec. 4723, Rev. C. 1907; re-en. Sec. 6974, R. C. M. 1921. Cal. Civ. C. Sec. 1270.

Operation and Effect

This section cannot be extended by construction so as to include any person other than those mentioned in it. In re Beck's Estate, 44 M 561, 580, 121 P 784, 1057.

The right to make a will is purely statutory and subject to the complete control of the legislature; it can withhold or grant the right, and if it grant it, it may make its exercise subject to such regulations and requirements as to it may seem proper. In re Mahaffay's Estate, 79 M 10, 17 et seq., 254 P 875.

The right to make testamentary disposition of property depends entirely upon the will of the legislature; it may withhold the right altogether or impose any limitations or restrictions upon it which it chooses. In re Hauge's Estate, 92 M 36, 39, 9 P 2d 1065.

Where testator died at the approximate age of twelve, horses bequeathed by him to his brother could not pass to his brother under the will, since testator being under the age of 18 was incapable of making a will under this section. Galbreath v. Armstrong, ___ M ___, 167 P 2d 337, 338.

Question of Mental Competency, Not Sanity

All that is required by this section is that a person have testamentary capacity at the time of the execution of the will. It is a question, not whether a testator is sane or insane, but rather whether or not he is mentally competent. What might be the considerations to be given to general insanity would take us far afield from the commonsense test and doctrine as to what constitutes mental incompetency. In re Cissel's Estate, 104 M 306, 314, 66 P 2d 779.

Testator May Dispose of Property as He Sees Fit

We must bear in mind that, one who contests a will has the burden of proof once the allegations of the petition for probate have been sufficiently proven. Also, that a testator may dispose of his property as he sees fit, and that courts cannot make wills for persons; held, in a will contest based on the physical and mental condition of the testator, judgment declaring the will invalid and denying probate thereof reversed, and trial court ordered to admit the will to probate, on the ground that evidence did not sub-

stantially support the verdict. In re Bensons's Estate, 110 M 25, 35, 98 P 2d 868.

Unnatural Disposition of Property

Where a will offered for probate is so unnatural, unfair or unjust on its face as to be contrary to sound public morals, fair play and justice, it calls for an explanation when challenged by contest, and though unnaturalness, standing alone does not raise a presumption of incompetency, it is a circumstance to be considered with other evidence where the will is attacked on ground of incompetency, being a circumstance tending to discredit the testator's testamentary capacity. In re Cissel's Estate, 104 M 306, 315, 66 P 2d 779.

References

In re Bernheim's Estate, 82 M 198, 215, 266 P 378; In re Bielenberg's Estate, 86 M 521, 528, 284 P 546; In re Silver's Estate, 98 M 141, 38 P 2d 277.

Executors and Administrators—270-274; Wills—21-55, 865, 866.

34 C.J.S. Executors and Administrators §§ 368, 478-481; 68 C.J. Wills § 23 et seq.

57 Am. Jur., Wills, §§ 50 et seq.

Will of blind person. 9 ALR 1416.

Validity of holographic will drawn on stationer's blank. 4 ALR 731.

Effect of guardianship of adult on testamentary capacity. 8 ALR 1375.

Wills: place of signature of attesting witnesses. 10 ALR 429.

Epilepsy as affecting testamentary capacity. 16 ALR 1418.

Establishment of will lost before testator's death. 34 ALR 1304.

Admissibility of evidence other than testimony of subscribing witness to prove due execution of will, or testamentary capacity. 63 ALR 1195.

Testamentary capacity as affected by use of intoxicating liquor or drugs. 67 ALR 857.

Interlineations or changes appearing on face of will. 67 ALR 1138.

Failure of part of will for lack of testamentary capacity or undue influence as affecting the remainder of the will. 69 ALR 1129.

Will as carrying enlarged interest of testator subsequent to execution. 75 ALR 515.

Codicil as affecting application of statutory provision to will, or previous codicil not otherwise subject, or as obviating objections to lack of testamentary capacity, undue influence, or defective execution otherwise fatal to will. 87 ALR 836.

Testamentary character of memorandum or other informal writing not testamentary

on its face regarding ownership or disposition of specific personal property. 117 ALR 1327.

Necessity and sufficiency of dating of holographic will. 147 ALR 898.

Designation of legatee or devisee by abbreviation. 153 ALR 486.

91-102. (6975) Married women, wills by. A married woman may make a will in the same manner and with the same effect as if she were sole, except that such will shall not, without the written consent of her husband, operate to deprive him of more than two-thirds of her real estate, or of more than two-thirds of her personal estate.

History: Ap. p. Sec. 1447, 5th Div. Comp. Stat. 1887; amd. Sec. 225, Civ. C. 1895; re-en. Sec. 3735, Rev. C. 1907; re-en. Sec. 6975, R. C. M. 1921. Cal. Civ. C. Sec. 1273.

Applies to All of Wife's Property

This section, limiting the extent to which a wife may dispose of her property, held to apply to all her property without reference to the character or time of its acquisition, and therefore includes her separate property acquired before marriage. In re Mahaffay's Estate, 79 M 10, 15 et seq., 254 P 875.

Constitutionality

Held, that this section does not offend against the provision of section 1 of the Fourteenth Amendment to the federal Constitution, guaranteeing the right to dispose of her personal property by will without her husband's consent, whereas a married man has that right without the wife's consent. In re Mahaffay's Estate, 79 M 10, 15 et seq., 254 P 875.

Effect on Probate of Failure to Provide for Husband

Under the rule that a will properly executed is entitled to probate, held, that a will of a married woman so executed, naming an executor, providing that he should pay her debts, funeral expenses and expenses of last illness from the funds of the estate, and revoking all former wills, was properly probated, the fact that testatrix, by failing to make mention of her surviving husband therein, had deprived him of two-thirds of her estate, in disregard of the provisions of this section, pro-

hibiting her from doing so, not being a reason for denying it probate. In re Mahaffay's Estate, 72 M 579, 582, 234 P 838.

Not Affected by Emancipating Statutes

Held, that this section, denying to a married woman the right to make a will which deprives the husband of more than two-thirds of her estate, has not been either directly or indirectly abrogated by the emancipating statutes relating to married women and is not contrary to the public policy of state. In re Mahaffay's Estate, 79 M 10, 15 et seq., 254 P 875.

What Is "Consent" by Husband

In an action to establish heirship to one-third of the estate of plaintiff's wife under this section, which provides that without the husband's written consent, a married woman cannot make a will which deprives him of more than two-thirds of her estate, held, that letters written by the husband suggesting divorce, that each retain the presents received from the other and that she was possessed of a considerable amount of property in her own right and therefore did not stand in need of alimony, did not constitute the written consent contemplated by this section. In re Mahaffay's Estate, 79 M 10, 15 et seq., 254 P 875.

References

Cited or applied as section 3735, Revised Codes, in *Hoffine v. Lincoln*, 52 M 585, 592, 160 P 820.

Wills—27-30.

68 C.J. Wills § 13 et seq.

57 Am. Jur., Wills, §§ 58-60.

Wills—151-166, 170.

68 C.J. Wills §§ 432 et seq., 438-442, 448, 459.

57 Am. Jur., Wills, §§ 349 et seq.

Failure of part of a will for lack of testamentary capacity or undue influence

91-103. (6976) Will, or part thereof, procured by fraud. A will, or a part of a will, procured to be made by duress, menace, fraud, or undue influence, may be denied probate; and a revocation, procured by the same means, may be declared void.

History: En. Sec. 434, p. 349, L. 1877; re-en. Sec. 434, 2nd Div. Rev. Stat. 1879; re-en. Sec. 434, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1721, Civ. C. 1895; re-en. Sec. 4724, Rev. C. 1907; re-en. Sec. 6976, R. C. M. 1921. Cal. Civ. C. Sec. 1272. Field Civ. C. Sec. 544.

as affecting the remainder of the will. 69 ALR 1129.

Codicil as affecting application of statutory provision to will, or previous codicil

not otherwise subject, or as obviating objections to lack of testamentary capacity, undue influence, or defective execution otherwise fatal to will. 87 ALR 836.

91-104. (6977) Who may take by will. A testamentary disposition may be made to any person capable of taking the property so disposed of, except corporations other than those formed for scientific, literary, or solely educational purposes, cannot take under a will, unless expressly authorized by statute.

History: En. Sec. 437, p. 349, L. 1877; re-en. Sec. 437, 2nd Div. Rev. Stat. 1879; re-en. Sec. 437, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1722, Civ. C. 1895; re-en. Sec. 4725, Rev. C. 1907; re-en. Sec. 6977, R. C. M. 1921. Cal. Civ. C. Sec. 1275. Based on Field Civ. C. Sec. 546.

Corporations

Only natural persons and corporations formed for scientific, literary, or solely educational purposes may take through testamentary disposition; other corporations, unless expressly authorized by statute to do so, cannot so take. In *re Beck's Estate*, 44 M 561, 572, 580, 121 P 784.

In the absence of some special disability declared by statute, any person may be a legatee or devisee, and where the statute of wills employs the word "persons" in designating those who are capable of taking, without limiting its meaning, it includes corporations unless prohibited from taking. In *re Hauge's Estate*, 92 M 36, 39 et seq., 9 P 2d 1065.

Id. Where a foreign corporation under the laws of its creation has the power to take a bequest made by a testator resident in another state and the testator is not prohibited by the laws of the state of his domicile from making it, the bequest is valid.

Id. If a Montana corporation is expressly authorized to take under a will, a foreign corporation of the same or similar class if authorized so as to take may do so under a will executed in this state though not authorized to do business here.

In General

This section cannot be construed to include any person, natural or artificial, among those who have the capacity to take under a will, other than those men-

tioned. In *re Beck's Estate*, 44 M 561, 580, 121 P 784, 1057.

Legacy Left to Dead Person or Estate of Deceased Person Void

Where a legacy or devise is left by will to a person who was dead at the time it was executed, it has generally been held, in the absence of statute to the contrary, that the gift lapses even though the fact of such death was known to the testator; it has also been held that a legacy to the estate of a deceased person is void, since an estate is not an entity or person capable of receiving the property willed. In *re Doyle's Estate*, 107 M 64, 67, 80 P 2d 374.

State of Montana

Where the state has not given its consent to becoming a beneficiary under a will, it is incapable of taking as a legatee. In *re Beck's Estate*, 44 M 561, 576, 121 P 784.

State Orphans' Home

Prior to the amendment of this section, it was held that this section, being exclusive in character, the state orphans' home, not being a corporation, either public or private, of the nature designated therein as capable of taking under testamentary disposition, could not do so. In *re Beck's Estate*, 44 M 561, 572, 121 P 784.

References

In *re Nossen's Estate*, ___ M ___, 162 P 2d 216, 217.

Corporations—434; Wills—10.

19 C.J.S. Corporations §1088; 68 C.J. Wills §122 et seq.

57 Am. Jur., Wills, §§ 153-161.

91-105. (6978) State institutions which may take by gift, bequest or grant. The state of Montana, the university of Montana, the state normal college, the state orphans' home, the state school for the deaf and blind, the state school of mines, the state reform school, the soldiers' home, the Montana state tuberculosis sanitarium, the state asylum for the insane, the state penitentiary, and any and all institutions now created or established, or which may hereafter be created or established, and supported in whole

or in part by the state of Montana for any purpose, are hereby empowered and given the right to accept, receive, take, hold, own, and possess gifts, donations, grants, devises, or bequests of real or personal property from any source whatsoever; and said gifts, donations, grants, bequests, or devises may be made direct to the state of Montana, or in the name of any of said institutions, or to any officer or board of said institutions, or to any person in trust for said institutions; but in the event the same shall be made direct to any such institution, or to any officer or board of any such institution, such gift, donation, grant, devise, or bequest shall be construed as a gift, donation, grant, devise, or bequest to the state of Montana, and shall be administered and used by the state of Montana for the particular purpose for which the same was given, donated, granted, bequeathed, or devised; and in the event no particular purpose is mentioned in such gift, grant, devise, or bequest, then the same shall be used for the general support, maintenance, or improvement of such institution by the state of Montana.

History: En. Sec. 1, Ch. 17, L. 1913; States 82, 85 and other particular topics.
re-en. Sec. 6978, R. C. M. 1921.

59 C.J. States §§ 273, 276 et seq.

91-106. (6979) Persons who may make gifts to state institution. A donation, gift, grant, bequest, devise, or testamentary disposition of property, real or personal, may be made by any person over the age of eighteen years, of sound mind, to the state of Montana, the university of Montana, the state normal college, the state orphans' home, the state school for the deaf and blind, the state school of mines, the state reform school, the soldiers' home, the state asylum for the insane, the state penitentiary, and any and all institutions now created or established, or which may hereafter be created or established and supported, in whole or in part, by the state of Montana for any purpose. And any person, corporation, or association of persons may make any gift, donation, or grant of property, real or personal, to the state of Montana, or to any of the institutions above named or referred to; but in the event any gift, donation, grant, devise, or bequest shall be made to any such institution, or to any officer or board of any such institution, the same shall be construed as a gift, donation, grant, devise, or bequest to the state of Montana, and shall be administered and used for the state of Montana for the particular purpose for which the same was given, donated, granted, bequeathed, or devised; and in the event no particular purpose is mentioned in such gift, grant, devise, or bequest, then the same shall be used for the general support, maintenance, or improvement of such institution by the state of Montana.

History: En. Sec. 2, Ch. 17, L. 1913;
re-en. Sec. 6979, R. C. M. 1921.

91-107. (6980) Written will, how to be executed. Every will, other than a nuncupative will, must be in writing; and every will, other than a holographic will, and a nuncupative will, must be executed and attested as follows:

1. It must be subscribed at the end thereof by the testator himself, or some person in his presence and by his direction must subscribe his name thereto;

2. The subscription must be made in the presence of the attesting witnesses, or be acknowledged by the testator to them to have been made by him or by his authority;

3. The testator must, at the time of subscribing or acknowledging the same, declare to the attesting witnesses that the instrument is his will; and,

4. There must be two attesting witnesses, each of whom must sign his name as a witness, at the end of the will, at the testator's request, and in his presence.

History: En. Sec. 438, p. 349, L. 1877; re-en. Sec. 438, 2nd Div. Rev. Stat. 1879; re-en. Sec. 438, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1723, Civ. C. 1895; re-en. Sec. 4726, Rev. C. 1907; re-en. Sec. 6980, R. C. M. 1921. Cal. Civ. C. Sec. 1276. Based on Field Civ. C. Sec. 550.

Cross-References

Recording authorized, sec. 86-406.

Wills to be in writing, sec. 93-1401-3.

Acknowledgment Established by Circumstantial Evidence

Acknowledgment by testator of his signature to his will may be established not only by spoken words but by circumstantial evidence, and where it is appended before attestation by witnesses, he may acknowledge it in any manner that conveys to the minds of witnesses of reasonable intelligence in an unmistakable manner his intention to acknowledge execution, either by gestures or conduct giving the witnesses to understand that the signature is his; and acknowledgment of the will necessarily acknowledges the testator's signature thereon. In re Bragg's Estate, 106 M 132, 145, 76 P 2d 57.

Deed to Be Delivered Upon Grantor's Death Not a Will

A deed to real property executed by the grantor and deposited by him in a safety deposit box with instruction that it be delivered upon his death, may not be considered a will, where not intended by the grantor as such and not executed with the proper formalities. *Carnahan v. Gupton*, 109 M 244, 260, 96 P 2d 513.

Not to Be Construed Beyond Natural Meaning

It has often been held that the statute relating to the execution and acknowledgment of a will must be strictly construed. Strict construction means nothing more than that a statute is not to be construed beyond its natural meaning. In re Bragg's Estate, 106 M 132, 145, 76 P 2d 57.

Proper Attestation Clause Raises Presumption of Due Execution

Where attestation clause is in due form,

and there is no question as to the genuineness of the signatures of the testator or the subscribing witnesses, it has evidentiary value in establishing due execution of the instrument, since such a clause raises a presumption of its due execution. In re Bragg's Estate, 106 M 132, 142, 76 P 2d 57.

Publication and Attestation

In making a will it is not essential that the testator should expressly declare the instrument to be his will, but if, consideration of all the attending facts and circumstances, a substantial compliance with subdivision 3 of this section is shown, it is sufficient. In re Miller's Estate, 37 M 545, 562, 97 P 935. See In re Noyes' Estate, 40 M 178, 189, 105 P 1013.

Subdivision 4 of this section was substantially complied with when the legal adviser of the testatrix requested, with her intelligent acquiescence, the witnesses to sign her will. In re Miller's Estate, 37 M 545, 563, 97 P 935. See In re Williams' Estate, 50 M 142, 155, 145 P 957.

Where one of the two subscribing witnesses did not hear a will read, was not requested by any one to sign as a witness to a will, did not see the signature of the testator, and was not informed of the character of the paper he signed, until nearly two years later, the testator did not publish the writing as his will as required by this section. In re Noyes' Estate, 40 M 178, 189, 105 P 1013.

Evidence in a will contest held to show that the requirement of this section, relative to publication of her will to the subscribing witnesses by the testatrix, was not observed. In re Williams' Estate, 50 M 142, 154, 145 P 957.

Id. The attesting witnesses to a will must, at the time they attest, be informed in some way, though not necessarily in words, by the testator himself that the instrument he has subscribed is his will; knowledge of this fact derived from any other source or at any other time being insufficient.

Evidence of a witness attesting a will at the request of another, showing that testatrix did not say anything or pay any attention when the request was made, did not do anything to indicate that the in-

strument was her will, and did not show any signs of intelligence while he was in the room, etc., is fatal to the will, if believed, as proving that the requirements of this section, relative to publication and attestation, were not complied with. In *re Cummings' Estate*, 92 M 185, 197, 11 P 2d 968.

A testator need not expressly declare to the subscribing witnesses that the document is his will, or expressly request them to sign as witnesses; if he, by words or conduct at the time of its execution, conveyed to them the information that it was his will and signed it in their presence, and in the same manner indicated that he desired them to subscribe it as witnesses, it is a sufficient compliance with the requirements of this section. In *re Silver's Estate*, 98 M 141, 157, 38 P 2d 277.

Purpose of Statutes on Execution of Wills

The purpose of this statute is to afford means for determining the authenticity of wills, to guard against and prevent mistake, imposition, undue influence, and to prevent substitution of some other writing in place thereof; when fraud, deception, undue influence or mental incapacity are absent, a substantial rather than a literal compliance with such formalities is sufficient. In *re Bragg's Estate*, 106 M 132, 141, 76 P 2d 57.

Requirement of Intent of Testator

The requirement that the will be subscribed by the testator means more than that the name shall be written. It must be written with the intent of the testator that the instrument shall be his will and that his name so written shall be his own record of such intent. To form such intent the testator must have the necessary mental competency therefor. If the testator is incompetent he does not execute the will and even though he writes his name thereon, such appearance of regularity is of no avail. In *re Mickich's Estate*, 114 M 258, 275, 136 P 2d 223.

Signing Witness May Testify Contrary to Recitals in Attestation Clause

Since the recitals in an attesting clause to a will are not always conclusive on the issues of proper publication and request (this section) by the testator, it may not be held that such a clause, signed by the witness with knowledge of what it would contain, concludes him from thereafter testifying contrary thereto. In *re Cummings' Estate*, 92 M 185, 197, 11 P 2d 968.

Subscribing Witness Must Testify

When a will is contested, the subscribing witnesses, if present in the county and of sound mind, must be produced and ex-

amined. If absent, the court may receive other evidence, if any can be had, of the facts mentioned in this section, but, as a rule, such facts, or many of them, can be proved only by the subscribing witnesses. *Farleigh v. Kelley*, 28 M 421, 430, 72 P 756.

Sufficiency of Subscribing

A testatrix, who, being too weak to sign her will without assistance, requested a bystander to assist her in doing so, and who, knowing that the instrument she was about to sign was her will, held the pen and attached her signature with her hand thus guided, subscribed the will as required by subdivision 1 of this section. In *re Miller's Estate*, 37 M 545, 560, 97 P 935. See *In re Noyes' Estate*, 40 M 178, 189, 105 P 1013.

Signature with Assistance of Another, Proper

Where an aged testator, physically weak but mentally competent, wrote the first three letters of his name without assistance and then, at suggestion of an attorney to which he assented, a nurse guided his hand as he completed the signature, the will was properly subscribed within the meaning of this section. In *re Sale's Estate*, 108 M 202, 206, 89 P 2d 1043.

Testimony of One Witness Sufficient

While subd. 4 of this section makes two attesting witnesses an indispensable requirement to a valid will, the satisfactory testimony of one witness entitled the will to probate as against the objection of defective execution of the attestation clause under sec. 93-401-1. In *re Bragg's Estate*, 106 M 132, 139, 76 P 2d 57.

Where Acknowledgment of Will Held Necessarily Acknowledging Signature

Where testatrix did not subscribe the will in the presence of the attesting witnesses, but came to O's place of business and said to him in the hearing of his employee D that she wanted both of them to sign her will as witnesses, the court denied probate on the ground that the declaration of testatrix that the instrument was her will did not meet the requirements of subd. 2 of this section as to subscribing in their presence or acknowledging her subscription thereto, held, under the rules and facts stated, that the court erred in denying probate, and acknowledgment of will necessarily acknowledges the signature. In *re Bragg's Estate*, 106 M 132, 152, 76 P 2d 57.

Operation and Effect

The legislative purpose, in enacting a statute rendering a will invalid unless it be executed with designated formalities is to prevent simulated and fraudulent writ-

ings from being probated as genuine. In re Watts' Estate, 117 M 505, 510, 522, 160 P 2d 437.

Id. The legislative mandates for execution of a will are supreme, and testamentary disposition cannot be made except upon compliance with those mandates.

References

Cited or applied as section 4726, Revised Codes, in *Sharky v. City of Butte*, 52 M 16, 21, 155 P 266. In re *Irvine's Estate*, 114 M 577, 584, 139 P 2d 489.

Wills—94-129.

68 C.J. Wills §§ 262, 273 et seq., 291, 360-392, 393.

57 Am. Jur., Wills, §§ 217 et seq.

Place of signature of attesting witnesses. 10 ALR 429.

Validity of will written on disconnected sheets. 30 ALR 424.

Manner of signing as affecting sufficiency of signature of testator. 31 ALR 682.

Duty of attesting witness with respect to testator's capacity. 35 ALR 79.

Effect of witness signing before testator signs. 39 ALR 933.

Effect of testator's attempted physical alteration of will after execution. 62 ALR 1367.

Admissibility of evidence other than testimony of subscribing witness to prove due execution of will, or testamentary capacity. 63 ALR 1195.

Necessity that attesting witnesses to will subscribe in presence of each other. 99 ALR 554.

Acknowledgment of signature by testator or witness to will as satisfying statutory requirement that testator or witness sign in the presence of each other. 115 ALR 689.

Necessity of, and what amounts to, request on part of testator to the witnesses to attest or subscribe will. 125 ALR 414.

Necessity that attesting witness to will not signed by testator in his presence shall have seen latter's signature on paper. 127 ALR 384.

Law in effect at time of execution of will or at time of death of testator as controlling. 129 ALR 859.

91-108. (6981) Definition of a holographic will. A holographic will is one that is entirely written, dated, and signed by the hand of the testator himself. It is subject to no other form, and may be made in or out of this state, and need not be witnessed.

History: En. Sec. 439, p. 349, L. 1877; re-en. Sec. 439, 2nd Div. Rev. Stat. 1879; re-en. Sec. 439, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1724, Civ. C. 1895; re-en. Sec. 4727, Rev. C. 1907; re-en. Sec. 6981, R. C. M. 1921. Cal. Civ. C. Sec. 1277.

Date Showing Month and Year But Not Day of Month, Held in Substantial Compliance

A holographic will entirely written by testatrix but dated "this day of May, 1938," held erroneously rejected on petition for probate on the ground that it did not bear the day of the month of its execution, since, the month and the year having been given, the requirement of this section that such a will shall be dated, was substantially complied with. In re *Irvine's Estate*, 114 M 577, 579, 139 P 2d 489.

Operation and Effect

A writing on a letter head of decedent, in which certain figures were printed in the designation of the year in the date, was invalid as a holographic will, though otherwise it met with all the requirements of the section. In re *Noyes' Estate*, 40 M 190, 195, 105 P 1017.

Held, that where about a month before his death decedent in a letter to his brother spoke of his financial situation and property, of his unfriendly attitude toward

his children, and that he had thought of making a testament "temporarily anyhow" so that the addressee and a son could get half each, although the latter "ought not to have anything," the letter, in the absence of any showing that decedent had ever mentioned the matter again, at most expressed an intention at some time in the future, to make a will in conformance with its contents, and insufficient to show the requisite animus testandi, and not entitled to probate. In re *Augestad's Estate*, 111 M 138, 141, 106 P 2d 1087.

A letter which informed the writer's sister "Ida" and brother-in-law of conditions of the writer's health, of the conditions of the weather and of the crops, and that if anything should happen to the writer "you Will all Find My Bisnes Fix and in the Citszen Bank Still looks like rain made ida over everything," and which stated nothing relative to what the writer did to "fix" his business was insufficient to constitute a holographic will. In re *Watts' Estate*, 117 M 505, 520, 160 P 2d 437.

References

Cited or applied as section 439, Second Division Compiled Statutes 1887, in *Barney v. Hayes*, 11 M 571, 29 P 282.

Wills—130-135.

68 C.J. Wills § 396 et seq.

57 Am. Jur., Wills, §§ 632-652.

Validity of holographic will drawn on stationer's blank. 4 ALR 731.

Requirement that holographic will must be entirely in hand of testator as affected

by printed or written matter on paper or form used. 61 ALR 398.

Changes by one other than testator after execution of holographic will as affecting its character as such. 124 ALR 633.

91-109. (6982) Witness to add residence. A witness to a written will must write, with his name, his place of residence; and a person who subscribes the testator's name, by his direction, must write his own name as a witness to the will. But a violation of this section does not affect the validity of the will.

History: En. Sec. 440, p. 349, L. 1877; re-en. Sec. 440, 2nd Div. Rev. Stat. 1879; re-en. Sec. 440, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1725, Civ. C. 1895; re-en. Sec. 4728, Rev. C. 1907; re-en. Sec. 6982, R. C.

M. 1921. Cal. Civ. C. Sec. 1278. Field Civ. C. Sec. 552.

Wills—111(3), 123(1).

68 C.J. Wills §§ 280 et seq., 366 et seq.

91-110. (6983) Mutual will. A conjoint or mutual will is valid, but it may be revoked by any of the testators, in like manner with any other will.

History: En. Sec. 441, p. 349, L. 1877; re-en. Sec. 441, 2nd Div. Rev. Stat. 1879; re-en. Sec. 441, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1726, Civ. C. 1895; re-en. Sec. 4729, Rev. C. 1907; re-en. Sec. 6983, R. C. M. 1921. Cal. Civ. C. Sec. 1279. Field Civ. C. Sec. 548.

Wills—100, 188.

69 C.J. Wills § 2709 et seq.

57 Am. Jur., Wills, §§ 680 et seq.

Right to revoke joint or mutual will. 43 ALR 1024.

91-111. (6984) Competency of subscribing witness. If the subscribing witnesses to a will are competent at the time of attesting its execution, their subsequent incompetency, from whatever cause it may arise, does not prevent the probate and allowance of the will, if it is otherwise satisfactorily proved.

History: En. Sec. 5, p. 556, Cod. Stat. 1871; re-en. Sec. 442, p. 350, L. 1877; re-en. Sec. 442, 2nd Div. Rev. Stat. 1879; re-en. Sec. 442, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1727, Civ. C. 1895; re-en. Sec. 4730, Rev. C. 1907; re-en. Sec. 6984, R. C. M. 1921. Cal. Civ. C. Sec. 1280.

References

Cited or applied as section 1727, Civil Code, in *In re Klein's Estate*, 35 M 185, 209, 88 P 798.

Wills—116.

68 C.J. Wills § 318 et seq.

57 Am. Jur., Wills, §§ 308 et seq.

91-112. (6985) Conditional will. A will, the validity of which is made by its own terms conditional, may be denied probate, according to the event, with reference to the condition.

History: En. Sec. 443, p. 350, L. 1877; re-en. Sec. 443, 2nd Div. Rev. Stat. 1879; re-en. Sec. 443, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1728, Civ. C. 1895; re-en. Sec. 4731, Rev. C. 1907; re-en. Sec. 6985, R. C.

M. 1921. Cal. Civ. C. Sec. 1281. Field Civ. C. Sec. 549.

Wills—80.

68 C.J. Wills § 256.

57 Am. Jur., Wills, §§ 671-679.

91-113. (6986) Gifts to subscribing witnesses void—creditors competent witnesses. All beneficial devises, legacies, and gifts whatever, made or given in any will to a subscribing witness thereto, are void, unless there are two other competent subscribing witnesses to the same; but a mere charge on the estate of the testator for the payment of debts does not prevent his creditors from being competent witnesses to his will.

History: En. Sec. 7, p. 556, Cod. Stat. 1871; re-en. Sec. 444, p. 350, L. 1877; re-en. Sec. 444, 2nd Div. Rev. Stat. 1879; re-en. Sec. 444, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1729, Civ. C. 1895; re-en. Sec. 4732, Rev. C. 1907; re-en. Sec. 6986, R. C. M. 1921. Cal. Civ. C. Sec. 1282.

Operation and Effect

One who was a necessary subscribing witness to a will cannot take as a beneficiary under it. In re Klein's Estate, 35 M 185, 211, 88 P 798.

This section does not apply to a witness to the due execution of a will if he is not a subscribing witness. In re Williams' Estate, 50 M 142, 151, 145 P 957.

Id. Fees to accrue to an executor are not more than compensation for services, and cannot be denominated a "legacy," or a "devise," or a "beneficial gift," so as to disqualify him for interest as a witness in a will contest.

91-114. (6987) Witness who is a beneficiary, entitled to share to amount of devise or bequest, when. If a witness, to whom any beneficial devise, legacy, or gift, void by the preceding section, is made, would have been entitled to any share of the estate of the testator, in case the will should not be established, he succeeds to so much of the share as would be distributed to him, not exceeding the devise or bequest made to him in the will, and he may recover the same of the other devisees or legatees named in the will, in proportion to and out of the parts devised or bequeathed to them.

History: En. Sec. 8, p. 556, Cod. Stat. 1871; re-en. Sec. 445, p. 350, L. 1877; re-en. Sec. 445, 2nd Div. Rev. Stat. 1879; re-en. Sec. 445, 2nd Div. Comp. Stat. 1887; re-en.

References

Cited or applied as section 1729, Civil Code, in State ex rel. Ruef v. District Court, 34 M 96, 105, 85 P 866.

Wills—116, 712.

68 C.J. Wills §§ 138 et seq., 318 et seq. Competency of husband or wife of beneficiary as attesting witness to will. 25 ALR 308.

Statute avoiding devise or bequest to subscribing witness as affecting latter's duty to elect where will disposes of property belonging to him. 29 ALR 230.

Competency of attesting witness who is not benefited by will except as in revoking earlier will. 64 ALR 1306.

Proof, or possibility of proof, of will without testimony of attesting witness as affecting application of statute relating to invalidation of will, or of devise or legacy, where attesting witness is beneficiary under will. 133 ALR 1286.

Sec. 1730, Civ. C. 1895; re-en. Sec. 4733, Rev. C. 1907; re-en. Sec. 6987, R. C. M. 1921. Cal. Civ. C. Sec. 1283.

91-115. (6988) Will made out of state. A will of real or personal property, or both, or a revocation thereof made out of this state by a person not having his domicile in this state, is as valid when executed according to the law of the place in which the same was made, or in which the testator was at the time domiciled, as if it were made in this state, and according to the provisions of this chapter.

History: En. Sec. 446, p. 350, L. 1877; re-en. Sec. 446, 2nd Div. Rev. Stat. 1879; re-en. Sec. 446, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1731, Civ. C. 1895; re-en. Sec. 4734, Rev. C. 1907; re-en. Sec. 6988, R. C. M. 1921. Field Civ. C. Sec. 554.

Operation and Effect

In order to allow a will executed in another state to probate in this state, it must first appear that it was duly proved, allowed, and admitted to probate in the court of the sister state; that it was

executed according to the law of the place in which it was made, or in which the testator was at the time domiciled, or in conformity to the laws of this state, and that the record is authenticated as required by section 905 of the United States Revised Statutes. State ex rel. Ruef v. District Court, 34 M 96, 104, 85 P 866. See Patterson v. Dickinson, 193 Fed. 328, 332.

Wills—70.

68 C.J. Wills § 251 et seq.

91-116. (6989) Subsequent change of domicile. Whenever a will or revocation thereof is duly executed according to the law of the place in

which the same was made, or in which the testator was at the time domiciled, the same is regulated, as to the validity of its execution, by the law of such place, notwithstanding the testator subsequently changed his domicile to a place by the law of which such will would be void.

History: En. Sec. 447, p. 351, L. 1877; re-en. Sec. 447, 2nd Div. Rev. Stat. 1879; re-en. Sec. 447, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1732, Civ. C. 1895; re-en. Sec. 4735, Rev. C. 1907; re-en. Sec. 6989, R. C. M. 1921. Based on Field Civ. C. Sec. 556.

91-117. (6990) Republication by codicil. The execution of a codicil, referring to a previous will, has the effect to republish the will, as modified by the codicil.

History: En. Sec. 448, p. 351, L. 1877; re-en. Sec. 448, 2nd Div. Rev. Stat. 1879; re-en. Sec. 448, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1733, Civ. C. 1895; re-en. Sec. 4736, Rev. C. 1907; re-en. Sec. 6990, R. C. M. 1921. Cal. Civ. C. Sec. 1287. Field Civ. C. Sec. 553.

Operation and Effect

An unreversed decree denying a petition for the probate of a will is not a bar to a subsequent petition for the probate of the same will with a codicil referring thereto

and modifying the same, as such codicil operates as a republication of the will. *Barney v. Hayes*, 11 M 99, 106, 27 P 384.

References

Cited or applied as section 4736, Revised Codes, in *In re Noyes' Estate*, 40 M 231, 238, 106 P 355; *In re Watts' Estate*, 117 M 505, 510, 160 P 2d 437.

Wills—199.

68 C.J. Wills § 576 et seq.
57 Am. Jur., Wills, § 626.

91-118. (6991) Nuncupative will—how to be executed. A nuncupative will is not required to be written, nor to be declared or attested with any formalities.

History: En. Sec. 449, p. 351, L. 1877; re-en. Sec. 449, 2nd Div. Rev. Stat. 1879; re-en. Sec. 449, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1734, Civ. C. 1895; re-en. Sec. 4737, Rev. C. 1907; re-en. Sec. 6991, R. C. M. 1921. Cal. Civ. C. Sec. 1288. Field Civ. C. Sec. 551.

References

In re Watts' Estate, 117 M 505, 510, 160 P 2d 437.

Wills—136.

68 C.J. Wills § 409.
57 Am. Jur., Wills, §§ 653-660.

91-119. (6992) Requisites of a valid nuncupative will. To make a nuncupative will valid, and to entitle it to be admitted to probate, the following requisites must be observed:

1. The estate bequeathed must not exceed in value the sum of one thousand dollars;

2. It must be proved by two witnesses who were present at the making thereof, one of whom was asked by the testator, at the time, to bear witness that such was his will, or to that effect;

3. The decedent must, at the time, have been in actual military service in the field, or doing duty on shipboard at sea, and in either case in actual contemplation, fear, or peril of death; or the decedent must have been, at the time, in expectation of immediate death from injury received the same day.

History: En. Sec. 450, p. 351, L. 1877; re-en. Sec. 450, 2nd Div. Rev. Stat. 1879; re-en. Sec. 450, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1735, Civ. C. 1895; re-en. Sec. 4738, Rev. C. 1907; re-en. Sec. 6992, R. C. M. 1921. Cal. Civ. C. Sec. 1289.

References

In re Watts' Estate, 117 M 505, 510, 160 P 2d 437.

Wills—136-156.

68 C.J. Wills § 432 et seq.

91-120. (6993) Proof of nuncupative wills. No proof must be received of any nuncupative will, unless it is offered within six months after speak-

ing the testamentary words, nor unless the words, or the substance thereof, were reduced to writing within thirty days after they were spoken.

History: En. Sec. 451, p. 351, L. 1877; re-en. Sec. 451, 2nd Div. Rev. Stat. 1879; re-en. Sec. 451, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1736, Civ. C. 1895; re-en. Sec. 4739, Rev. C. 1907; re-en. Sec. 6993, R. C. M. 1921. Cal. Civ. C. Sec. 1290.

References

In re Watts' Estate, 117 M 505, 510, 160 P 2d 437.

91-121. (6994) Probate of nuncupative wills. No probate of any nuncupative will must be granted for fourteen days after the death of the testator, nor must any nuncupative will be at any time proved, unless the testamentary words, or the substance thereof, be first committed to writing, and a process issued to call in the widow, or other persons interested, to contest the probate of such will, if they think proper.

History: En. Sec. 452, p. 352, L. 1877; re-en. Sec. 452, 2nd Div. Rev. Stat. 1879; re-en. Sec. 452, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1737, Civ. C. 1895; re-en. Sec. 4740, Rev. C. 1907; re-en. Sec. 6994, R. C. M. 1921. Cal. Civ. C. Sec. 1291.

References

In re Watts' Estate, 117 M 505, 510, 160 P 2d 437.

Wills \S 146, 259, 269, 270.

68 C.J. Wills \S 428, 694 et seq., 711 et seq.

91-122. (6995) Written will—how revoked. Except in the cases in this chapter mentioned, no written will, nor any part thereof, can be revoked or altered otherwise than:

1. By a written will, or other writing of a testator, declaring such revocation or alteration, and executed with the same formalities with which a will should be executed by such testator; or,

2. By being burnt, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by some person in his presence and by his direction.

History: En. Sec. 453, p. 352, L. 1877; re-en. Sec. 453, 2nd Div. Rev. Stat. 1879; re-en. Sec. 453, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1738, Civ. C. 1895; re-en. Sec. 4741, Rev. C. 1907; re-en. Sec. 6995, R. C. M. 1921. Cal. Civ. Sec. 1292. Field Civ. C. Sec. 561.

Operation and Effect

Two wills by the same testator, in the execution of both of which the statutory requirements have been met, must be construed together, unless the former has been revoked by the testator as prescribed by the statute. In re Noyes' Estate, 40 M 231, 238, 106 P 355.

References

In re Toomey's Estate, 96 M 489, 496, 31 P 2d 729; In re Watts' Estate, 117 M 505, 510, 160 P 2d 437.

Wills \S 167-195.

68 C.J. Wills \S 478 et seq.

57 Am. Jur., Wills, \S 454 et seq.

Revocation of will by writing not testamentary in character. 3 ALR 833.

Revocation of later will as reviving earlier will. 28 ALR 911.

Right to revoke joint or mutual will. 43 ALR 1024.

Destruction or cancelation, actual or presumed, of one copy of will executed in duplicate, as revocation of other copy. 48 ALR 297.

Effect of testator's attempted physical alteration of will after execution. 62 ALR 1367.

Revocation of earlier will by revoking clause in a lost will or other lost instrument. 94 ALR 1024.

Revocation of will by ratification or adoption of physical destruction or mutilation of will without testator's knowledge or consent in first instance. 99 ALR 524.

Necessity that physical destruction or mutilation of will be done in testator's presence in order to effect revocation. 100 ALR 1520.

Probate of will or proceedings subsequent thereto as affecting right to probate later codicil or will, and rights and remedies of parties thereunder. 107 ALR 249.

Possibility of avoiding or limiting effect of clause in later will purporting to revoke all former wills. 125 ALR 936.

Disinheritance provision or mere nominal bequest as affecting application of statute for benefit of pretermitted children. 152 ALR 723.

91-123. (6996) Evidence of revocation. When a will is canceled or destroyed by any other person than the testator, the direction of the testator, and the fact of such injury or destruction, must be proved by two witnesses.

History: En. Sec. 454, p. 352, L. 1877; re-en. Sec. 454, 2nd Div. Rev. Stat. 1879; re-en. Sec. 454, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1739, Civ. C. 1895; re-en. Sec. 4742, Rev. C. 1907; re-en. Sec. 6996, R. C. M. 1921. Cal. Civ. C. Sec. 1293. Field Civ. C. Sec. 562.

References

In re Watts' Estate, 117 M 505, 510, 160 P 2d 437.

Wills⇨306.

68 C.J. Wills § 813 et seq.

57 Am. Jur., Wills, §§ 541 et seq.

91-124. (6997) Revocation of duplicate. The revocation of a will, executed in duplicate, may be made by revoking one of the duplicates.

History: En. Sec. 455, p. 352, L. 1877; re-en. Sec. 455, 2nd Div. Rev. Stat. 1879; re-en. Sec. 455, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1740, Civ. C. 1895; re-en. Sec. 4743, Rev. C. 1907; re-en. Sec. 6997, R. C. M. 1921. Field Civ. C. Sec. 564.

References

In re Watts' Estate, 117 M 505, 510, 160 P 2d 437.

Wills⇨175.

68 C.J. Wills § 521.

91-125. (6998) Revocation by subsequent will. A prior will is not revoked by a subsequent will, unless the latter contains an express revocation, or provisions wholly inconsistent with the terms of the former will; but in other cases the prior will remains effectual so far as consistent with the provisions of the subsequent will.

History: En. Sec. 456, p. 352, L. 1877; re-en. Sec. 456, 2nd Div. Rev. Stat. 1879; re-en. Sec. 456, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1741, Civ. C. 1895; re-en. Sec. 4744, Rev. C. 1907; re-en. Sec. 6998, R. C. M. 1921. Cal. Civ. C. Sec. 1296. Field Civ. C. Sec. 565.

Operation and Effect

In ascertaining the intention of a testator, his will and a letter written some two years later and treated as a codicil,

held properly construed together. In re Toomey's Estate, 96 M 489, 496, 31 P 2d 729.

References

In re Cheiniere's Estate, 117 M 65, 74, 156 P 2d 635; In re Watts' Estate, 117 M 505, 510, 160 P 2d 437.

Wills⇨178-183.

68 C.J. Wills § 478 et seq.

57 Am. Jur., Wills, §§ 466 et seq.

91-126. (6999) Antecedent not revived by revocation of subsequent will. If, after making a will, the testator duly makes and executes a second will, the destruction, cancellation, or revocation of such second will does not revive the first will, unless it appears by the terms of such revocation that it was the intention to revive and give effect to the first will, or unless, after such destruction, cancellation, or revocation, the first will was duly republished.

History: En. Sec. 457, p. 353, L. 1877; re-en. Sec. 457, 2nd Div. Rev. Stat. 1879; re-en. Sec. 457, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1742, Civ. C. 1895; re-en. Sec. 4745, Rev. C. 1907; re-en. Sec. 6999, R. C. M. 1921. Cal. Civ. C. Sec. 1297. Based on Field Civ. C. Sec. 566.

References

Cited or applied as section 4745, Revised Codes, in In re Estate of Peterson, 49 M 96, 98, 140 P 237; In re Watts' Estate, 117 M 505, 510, 160 P 2d 437.

Wills⇨198.

68 C.J. Wills § 578.

57 Am. Jur., Wills, §§ 619-624.

91-127. (7000) Revocation by marriage and birth of issue. If, after having made a will, the testator marries, and has issue of such marriage, born either in his lifetime or after his death, and the wife or issue survive him, the will is revoked unless provision has been made for such issue by some settlement, or unless such issue are provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of such revocation can be received.

History: En. Sec. 458, p. 353, L. 1877; re-en. Sec. 458, 2nd Div. Rev. Stat. 1879; re-en. Sec. 458, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1743, Civ. C. 1895; re-en. Sec. 4746, Rev. C. 1907; re-en. Sec. 7000, R. C. M. 1921. Cal. Civ. C. Sec. 1298. Field Civ. C. Sec. 567.

References

Cited or applied as section 4746, Revised Codes, in *In re Noyes' Estate*, 40 M 231, 238, 106 P 355; *In re Estate of Peterson*, 49 M 96, 98, 140 P 237.

57 Am. Jur., Wills, §§ 572 et seq.

Effect of marriage or subsequent birth of child on exercise of power of appointment. 16 ALR 1370.

Illegitimacy of child as affecting revocation of will by subsequent birth of child. 18 ALR 91.

Statute as to effect of subsequent birth of a child as applicable where will provided for child, in the absence of an express exception. 30 ALR 1236.

Adopted child as within contemplation of statutes regarding right of children pretermitted by will, or statutes preventing disinheritance of child. 105 ALR 1176.

When will deemed to have provided for, or contemplated, contingency of future birth or adoption of children, marriage, or other event which by statute wholly or partially revokes or otherwise renders such will inoperative. 127 ALR 750.

Illegitimate child as within contemplation of statute regarding right of child pretermitted by will, or statute preventing disinheritance of child. 142 ALR 1447.

Disinheritance provision or mere nominal bequest as affecting application of statute for benefit of pretermitted children. 152 ALR 723.

91-128. (7001) Effect of marriage of a man on his will. If, after making a will, the testator marries, and the wife survives the testator, the will is revoked, unless provision has been made for her by marriage contract, or unless she is provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of revocation must be received.

History: En. Sec. 459, p. 353, L. 1877; re-en. Sec. 459, 2nd Div. Rev. Stat. 1879; re-en. Sec. 459, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1744, Civ. C. 1895; re-en. Sec. 4747, Rev. C. 1907; re-en. Sec. 7001, R. C. M. 1921. Cal. Civ. C. Sec. 1299.

References

Cited or applied as section 1744, Civil Code, in *State ex rel. Ruef v. District Court*, 34 M 96, 105, 85 P 866; as section 4747, Revised Codes, in *In re Noyes' Estate*, 40 M 231, 238, 106 P 355; *In re Estate of Peterson*, 49 M 96, 98, 140 P 237.

Wills 191, 290.

68 C.J. Wills §§ 534 et seq., 757 et seq.

57 Am. Jur., Wills, §§ 526-534.

Effect of marriage or subsequent birth of child on exercise of power of appointment. 16 ALR 1370.

When will deemed to have provided for, or contemplated, contingency of future birth or adoption of children, marriage, or other event which by statute wholly or partially revokes or otherwise renders such will inoperative. 127 ALR 750.

91-129. (7002) Effect of marriage of a woman on her will. A will, executed by an unmarried woman, is revoked by her subsequent marriage, and is not revived by the death of her husband.

History: En. Sec. 460, p. 353, L. 1877; re-en. Sec. 460, 2nd Div. Rev. Stat. 1879; re-en. Sec. 1745, Civ. C. 1895; re-en. Sec.

4748, Rev. C. 1907; re-en. Sec. 7002, R. C. M. 1921. Cal. Civ. C. Sec. 1300. Based on Field Civ. C. Sec. 568.

Wills⇨191, 201.
68 C.J. Wills §§ 478 et seq., 534 et seq.

91-130. (7003) Contract of sale not a revocation. An agreement made by a testator, for the sale or transfer of property disposed of by a will previously made, does not revoke such disposal; but the property passes by the will, subject to the same remedies on the testator's agreement, for a specific performance or otherwise against the devisees or legatees, as might be had against the testator's successors, if the same had passed by succession.

History: En. Sec. 461, p. 353, L. 1877; re-en. Sec. 461, 2nd Div. Rev. Stat. 1879; re-en. Sec. 461, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1746, Civ. C. 1895; re-en. Sec. 4749, Rev. C. 1907; re-en. Sec. 7003, R. C. M. 1921. Cal. Civ. C. Sec. 1301. Field Civ. C. Sec. 569.

Operation and Effect

The execution of a deed to property, placed in escrow with a contract for future delivery, subsequent to a devise of the property to the wife of the testator, does not effect a divestiture, but title passes subject to the conditions imposed. Chadwick v. Tatem, 9 M 354, 363, 23 P 729.

See Tyler v. Tyler, 50 M 65, 72, 144 P 1090.

If an owner has given an option to purchase, and deposits a deed in escrow to be delivered upon condition of payment, but dies before the exercise of the option, the title is still in him and must necessarily descend to his heirs, subject to such right as the holder of the option contract has under which the deposit was made. Tyler v. Tyler, 50 M 65, 72, 144 P 1090

Executors and Administrators⇨92; Wills⇨194.

33 C.J.S. Executors and Administrators §§ 189, 201; 68 C.J. Wills § 543 et seq.

91-131. (7004) Mortgage not a revocation of will. A charge or encumbrance upon any estate, for the purpose of securing the payment of money or the performance of any covenant or agreement, is not a revocation of any will relating to the same estate which was previously executed; but the devises and legacies therein contained must pass, subject to such charge or encumbrance.

History: En. Sec. 462, p. 354, L. 1877; re-en. Sec. 462, 2nd Div. Rev. Stat. 1879; re-en. Sec. 462, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1747, Civ. C. 1895; re-en. Sec. 4750, Rev. C. 1907; re-en. Sec. 7004, R. C.

M. 1921. Cal. Civ. C. Sec. 1302. Based on Field Civ. C. Sec. 570.

Wills⇨194, 840.

68 C.J. Wills §§ 543 et seq; 69 C.J. Wills §§ 2563 et seq.

91-132. (7005) Conveyance—when not a revocation. A conveyance, settlement, or other act of a testator, by which his interest in a thing previously disposed of by his will is altered, but not wholly divested, is not a revocation, but the will passes the property which would otherwise devolve by succession.

History: En. Sec. 463, p. 354, L. 1877; re-en. Sec. 463, 2nd Div. Rev. Stat. 1879; re-en. Sec. 463, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1748, Civ. C. 1895; re-en. Sec. 4751, Rev. C. 1907; re-en. Sec. 7005, R. C. M. 1921. Cal. Civ. C. Sec. 1303. Field Civ. C. Sec. 571.

References

Cited or applied as section 4751, Revised Codes, in Tyler v. Tyler, 50 M 65, 72, 74, 144 P 1090.

91-133. (7006) When it is a revocation. If the instrument by which an alteration is made of the testator's interest in a thing previously disposed of by his will expresses his intent that it shall be a revocation, or if it contains provisions wholly inconsistent with the terms and nature of the testamentary disposition, it operates as a revocation thereof, unless such

inconsistent provisions depend on a condition or contingency by reason of which they do not take effect.

History: En. Sec. 464, p. 354, L. 1877; 4752, Rev. C. 1907; re-en. Sec. 7006, R. re-en. Sec. 464, 2nd Div. Rev. Stat. 1879; C. M. 1921. Cal. Civ. C. Sec. 1304. Field re-en. Sec. 464, 2nd Div. Comp. Stat. 1887; Civ. C. Sec. 572.
re-en. Sec. 1749, Civ. C. 1895; re-en. Sec.

91-134. (7007) Revocation of codicils. The revocation of a will revokes all its codicils.

History: En. Sec. 465, p. 354, L. 1877; 4753, Rev. C. 1907; re-en. Sec. 7007, R. C. re-en. Sec. 465, 2nd Div. Rev. Stat. 1879; M. 1921. Cal. Civ. C. Sec. 1305. Field Civ. re-en. Sec. 465, 2nd Div. Comp. Stat. 1887; C. Sec. 573.
re-en. Sec. 1750, Civ. C. 1895; re-en. Sec.

91-135. (7008) After-born child, unprovided for, to succeed. Whenever a testator has a child born after the making of his will, either in his lifetime or after his death, and dies leaving such child unprovided for by any settlement, and neither provided for nor in any way mentioned in his will, the child succeeds to the same portion of the testator's real and personal property that he would have succeeded to if the testator had died intestate.

History: Ap. p. Sec. 22, p. 558, Cod. Stat. 1871; en. Sec. 466, p. 354, L. 1877; re-en. Sec. 466, 2nd Div. Rev. Stat. 1879; re-en. Sec. 466, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1751, Civ. C. 1895; re-en. Sec. 4754, Rev. C. 1907; re-en. Sec. 7008, R. C. M. 1921. Cal. Civ. C. Sec. 1306. Field Civ. C. Sec. 574.

References

Cited or applied as section 1751, Civil Code, in *State ex rel. Ruef v. District Court*, 34 M 96, 105, 85 P 866.

Descent and Distribution ⇨ 47.
26 C.J.S. Descent and Distribution § 43 et seq.
57 Am. Jur., Wills, §§ 572 et seq.

91-136. (7009) Children or issue of children of testator unprovided for by his will. When any testator omits to provide in his will for any of his children, or for the issue of any deceased child, unless it appears that such omission was intentional, such child or the issue of such child, must have the same share in the estate of the testator as if he had died intestate, and succeeds thereto as provided in the preceding section.

History: En. Sec. 23, p. 558, Cod. Stat. 1871; re-en. Sec. 467, p. 354, L. 1877; re-en. Sec. 467, 2nd Div. Rev. Stat. 1879; re-en. Sec. 467, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1752, Civ. C. 1895; re-en. Sec. 4755, Rev. C. 1907; re-en. Sec. 7009, R. C. M. 1921. Cal. Civ. C. Sec. 1307.

Operation and Effect

Where a testator has omitted in his will to provide for any of his children, evidence dehors the will may be received to ascertain whether the omission was intentional. In re *Estate of Peterson*, 49 M 96, 98, 140 P 237.

Possible Effect of Exclusion of Lawful Heirs

The exclusion of lawful heirs from a will

may properly be considered as an indication of lack of recollection, showing incompetence to make a will. (The will in contest allegedly executed while testator was suffering from a streptococcus infection which rapidly spread throughout his system, progressively weakening his mental faculties.) In re *Mickich's Estate*, 114 M 258, 275, 136 P 2d 223.

References

Cited or applied as section 1752, Civil Code, in *State ex rel. Ruef v. District Court*, 34 M 96, 105, 85 P 866.

Wills ⇨ 47.
68 C.J. Wills § 39.

91-137. (7010) Share of after-born child or child omitted from will, out of what part of estate to be paid. When any share of the estate of

a testator is assigned to a child born after the making of a will, or to a child, or the issue of a child, omitted in the will, as hereinbefore mentioned, the same must first be taken from the estate not disposed of by the will, if any; if that is not sufficient, so much as may be necessary must be taken from the devisees or legatees in proportion to the value they may respectively receive under the will, unless the obvious intention of the testator in relation to some specific devise or bequest, or other provision in the will, would thereby be defeated; in such case, such specific devise, legacy, or provision may be exempted from such apportionment, and a different apportionment, consistent with the intention of the testator, may be adopted.

History: Ap. p. Sec. 24, p. 558, Cod. Stat. 1871; en. Sec. 468, p. 354, L. 1877; re-en. Sec. 468, 2nd Div. Rev. Stat. 1879; re-en. Sec. 468, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1753, Civ. C. 1895; re-en. Sec.

4756, Rev. C. 1907; re-en. Sec. 7010, R. C. M. 1921. Cal. Civ. C. Sec. 1308.

Wills \hookrightarrow 804-818.

69 C.J. Wills §§ 2171, 2181, 2182, 2189, 2193.

91-138. (7011) Advancement during lifetime of testator. If such children, or their descendants, so unprovided for, had an equal proportion of the testator's estate bestowed on them in the testator's lifetime, by way of advancement, they take nothing in virtue of the provisions of the three preceding sections.

History: En. Sec. 469, p. 355, L. 1877; re-en. Sec. 469, 2nd Div. Rev. Stat. 1879; re-en. Sec. 469, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1754, Civ. C. 1895; re-en. Sec. 4757, Rev. C. 1907; re-en. Sec. 7011, R. C. M. 1921. Cal. Civ. C. Sec. 1309.

References

Cited or applied as section 4757, Revised Codes, in *In re Estate of Peterson*, 49 M 96, 99, 140 P 237.

Wills \hookrightarrow 759.

69 C.J. Wills § 2233 et seq.

91-139. (7012) Lineal descendants take estate upon death of devisee or legatee before testator. When any estate is devised or bequeathed to any child, or other relation of the testator, and the devisee or legatee dies before the testator, leaving lineal descendants, such descendants take the estate so given by the will, in the same manner as the devisee or legatee would have done had he survived the testator.

History: Ap. p. Sec. 25, p. 558, Cod. Stat. 1871; en. Sec. 470, p. 355, L. 1877; re-en. Sec. 470, 2nd Div. Rev. Stat. 1879; re-en. Sec. 470, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1755, Civ. C. 1895; re-en. Sec. 4758, Rev. C. 1907; re-en. Sec. 7012, R. C. M. 1921; amd. Sec. 1, Ch. 58, L. 1947. Cal. Civ. C. Sec. 1310.

Applies to Real Property Only

Held, under the rule of *stare decisis*, that this section, referring to devised estate, applies only to real property. *Converse v. Byars et al.*, 112 M 372, 378, 118 P 2d 144.

Operation and Effect

The word "devised" used in this section, providing that if any estate is devised to any relative of the testator, and the devisee died before the testator, leaving lineal descendants, they take the estate so given in the same manner the devisee would have done had he survived testator,

held to mean a gift of real property by will, and not a gift of personal property. *In re Pratt's Estate*, 60 M 526, 537, 199 P 711.

This section, providing that, when any estate is devised to any child or other relation of the testator and the devisee dies before the testator, leaving lineal descendants, such descendants take the estate given by the will in the same manner as the devisee would have done had he survived the testator, applies only to devises and not to legacies. *In re Estate of Hash*, 64 M 118, 208 P 605.

Id. Where it appeared that testator intended to substitute someone else in the place of named devisee and legatee in case of his death before that of testator, this section does not apply since such substitution is recognized by section 91-227.

Wills \hookrightarrow 552.

69 C.J. Wills § 2279 et seq.

91-140. (7013) Devises of land—how construed. Every devise of land in any will conveys all the estate of the devisor therein, which he could lawfully devise, unless it clearly appears by the will that he intended to convey a less estate.

History: En. Sec. 2, p. 555, Cod. Stat. 1871; re-en. Sec. 471, p. 355, L. 1877; re-en. Sec. 471, 2nd Div. Rev. Stat. 1879; re-en. Sec. 471, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1756, Civ. C. 1895; re-en. Sec. 4759, Rev. C. 1907; re-en. Sec. 7013, R. C. M. 1921. Cal. Civ. C. Sec. 1311.

References

Cited or applied as section 4759, Revised Codes, in *In re Estate of Peterson*, 49 M 96, 98, 140 P 237; *In re Fratt's Estate*, 60 M 526, 537, 199 P 711.

Wills—590.

69 C.J. Wills § 1488 et seq.

91-141. (7014) Wills pass estate subsequently acquired. Any estate, right, or interest in lands acquired by the testator after the making of his will, passes thereby and in like manner as if title thereto were vested in him at the time of making the will, unless the contrary manifestly appears by the will to have been the intention of the testator. Every will made in express terms devising, or in any other terms denoting the intent of the testator to devise all real estate of such testator, passes all the real estate which such testator was entitled to devise at the time of his decease.

History: Ap. p. Sec. 3, p. 556, Cod. Stat. 1871; en. Sec. 472, p. 355, L. 1877; re-en. Sec. 472, 2nd Div. Rev. Stat. 1879; re-en. Sec. 472, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1757, Civ. C. 1895; re-en. Sec. 4760, Rev. C. 1907; re-en. Sec. 7014, R. C. M. 1921. Cal. Civ. C. Sec. 1312.

Codes, in *In re Estate of Peterson*, 49 M 96, 98, 140 P 237; *In re Fratt's Estate*, 60 M 526, 537, 199 P 711.

Wills—482, 578.

69 C.J. Wills §§ 1168 et seq., 1383 et seq. 57 Am. Jur., Wills, §§ 1309-1315.

Will as carrying enlarged interest of testator subsequent to execution. 75 ALR 515.

References

Cited or applied as section 4760, Revised

91-142. (7015) Restriction to devise for charitable purposes. No estate, real or personal, shall be bequeathed or devised to any charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses, except the same be done by will duly executed at least thirty (30) days before the decease of the testator, and if so made at least thirty (30) days prior to such death, such devise or legacy, and each of them, shall be valid; provided that the prohibition contained in this section shall not apply to cases where not more than one-third (1/3) of the estate of the testator shall be bequeathed or devised for charitable or benevolent purposes, and provided further, that if any such devise or bequest be made in a will executed within thirty (30) days prior to such death and be for more than one-third (1/3) of the estate of the decedent, the same shall be void as to the excess over one-third (1/3), but as to that only.

History: En. Sec. 1, p. 69, L. 1893; re-en. Sec. 1759, Civ. C. 1895; re-en. Sec. 4762, Rev. C. 1907; re-en. Sec. 7015, R. C. M. 1921; amd. Sec. 1, Ch. 93, L. 1945. Cal. Civ. C. Sec. 1313.

72 M 431, 436, 234 P 258; *In re Hauge's Estate*, 92 M 36, 41, 9 P 2d 1065.

Wills—12-16.

68 C.J. Wills § 155 et seq.

57 Am. Jur., Wills, § 159.

References

Cited or applied as section 4762, Revised Codes, in *In re Hobbins' Estate*, 41 M 39, 48, 108 P 7; *In re Beck's Estate*, 44 M 561, 577, 121 P 784; *In re Coppock's Estate*,

What institution or gifts are within statutes declaring invalid bequest for charitable, benevolent, religious, or similar purposes, if made within a specified period

before testator's death, or prohibiting, or limiting the amount of, such bequest. 111 ALR 525.

Waiver, or failure to invoke protection,

of statute regarding amount, or time of making, of bequest to religious, charitable, or other specified classes of institutions. 154 ALR 682.

CHAPTER 2

WILLS—INTERPRETATION

- Section 91-201. Testator's intention to be carried out.
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91-201. (7016) Testator's intention to be carried out. A will is to be construed according to the intention of the testator. Where his intention cannot have effect to its full extent, it must have effect as far as possible.

History: En. Sec. 474, p. 356, L. 1877; re-en. Sec. 474, 2nd Div. Rev. Stat. 1879; re-en. Sec. 474, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1770, Civ. C. 1895; re-en. Sec. 4763, Rev. C. 1907; re-en. Sec. 7016, R. C. M. 1921. Cal. Civ. C. Sec. 1317. Field Civ. C. Sec. 579.

Construing Liberal Life Estate Clause

Under a will bequeathing and devising to testator's widow all of his property during her life, with power to sell or hypothecate it to the same effect as if she were the sole owner thereof, with the sole exception that she should not make any testamentary disposition of the remainder, the widow, under its terms as presented,

held to have had the right to use the funds of such estate for employment of a bookkeeper and manager of her own private property, the life estate by such employment having contributed to her enjoyment thereof as intended by the testator. In re Yergy's Estate, 106 M 505, 511, 79 P 2d 555.

Extent of Enjoyment of Life Estate

Under the terms of a will which devised and bequeathed all of the husband's property to his wife during her life, and granted her liberal powers as to the sale, use and hypothecation thereof, held, that she could employ a bookkeeper and manager for her own personal estate from the

funds of the life estate, but could not charge the costs of repairs and betterments of her individual real property thereto. In re Yergy's Estate, 106 M 505, 511, 79 P 2d 555.

Fixed Rules for Interpretation of Writings Yield to the Testator's Intention

Where a holographic will contained only one paragraph in which property was disposed of and the only beneficiary was named in the first sentence as one to whom certain of personal property was given, followed by a new incomplete sentence stating merely "All the rest * * * of my estate * * *," testator's intention to devise all of his property to the beneficiary named was manifest, particularly where the circumstances of testator's life were entirely consistent with this construction. Fixed rules for the interpretation of writings yield to the basic principal that the thing to be sought for is the intention of the testator. Of two modes of interpretation, that which prevents intestacy preferred. *Blacker v. Thatcher*, 145 F 2d 255.

Operation and Effect

That construction of a will must be favored which will reconcile with testator's intention the several provisions thereof. In re McLure's Estate, 63 M 536, 541, 208 P 900; In re Murphy's Estate, 99 M 114, 43 P 2d 233.

When one makes a will, the natural and reasonable presumption is that he intends to dispose of his entire estate, and every word in it must be given effect, if possible. In re Spriggs' Estate, 70 M 272, 274, 225 P 617.

A will must be construed according to the intention of the testator and so as to avoid total intestacy, if possible. In re Hauge's Estate, 92 M 36, 44, 9 P 2d 1065.

Our law enjoins upon the courts the duty to give effect to the intention of the

testator, if possible, and, unless there is substantial evidence tending to nullify the instrument, the court should not permit it to be set aside. (In re Cummings' Estate, 92 M 185, 11 P 2d 968.) In re Silver's Estate, 98 M 141, 150, 38 P 2d 277.

In construing wills, fixed rules for interpretation of writings yield to the basic principle that the thing to be sought for is the intention of testator. In re Strode's Estate, ___ M ___, 167 P 2d 579, 581.

Testimony Indicating Intent to Execute Conveyance Rather Than to Make Testamentary Disposition

Testimony that at the time decedent grantor delivered a deed to her property to her brother-in-law with the statement that so long as she lived the income therefrom should belong to her, and that in the event anything should happen to her, the proper papers were made out leaving everything to him, held not open to construction that grantor intended making a testamentary disposition rather than to execute a conveyance, in view of testimony of disinterested witness that she heard decedent tell grantee that she had made a deed and given everything to him, and grantee's testimony that she told him, "This belongs to you now." *Walsh v. Kennedy*, 115 M 551, 566, 147 P 2d 425.

References

Cited or applied as section 1770, Civil Code, in In re Klein's Estate, 35 M 185, 204, 88 P 798; In re Noyes' Estate, 40 M 231, 247, 106 P 355; *Philbrick v. American Bank & Trust Co.*, 58 M 376, 389, 193 P 59; In re Doyle's Estate, 107 M 64, 67; 80 P 2d 374; In re Irvine's Estate, 114 M 577, 581, 139 P 2d 489.

Wills[©]438-444.

69 C.J. Wills § 1118 et seq.

57 Am. Jur., Wills, §§ 1133-1146.

91-202. (7017) Intention to be ascertained from will. In cases of uncertainty arising upon the face of a will, as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, exclusive of his oral declarations.

History: En. Sec. 475, p. 356, L. 1877; re-en. Sec. 475, 2nd Div. Rev. Stat. 1879; re-en. Sec. 475, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1771, Civ. C. 1895; re-en. Sec. 4764, Rev. C. 1907; re-en. Sec. 7017, R. C. M. 1921. Cal. Civ. C. Sec. 1318. Field Civ. C. Sec. 580.

Operation and Effect

The word "children," in a will, has been held to include grandchildren in only two classes of cases. The first class is where

there is an ambiguity in the will itself which leaves the meaning of the testator in respect to the word "children" uncertain. In such cases extrinsic evidence may be introduced to explain the meaning intended by the testatrix and to show that the word was used to include grandchildren. This class is within scope of this section. The other class consists of cases where there is a latent ambiguity, and comes within section 91-224. In re Estate of Hash, 64 M 118, 122, 208 P 605.

References

Cited or applied as section 1771, Civil Code, in *In re Klein's Estate*, 35 M 185, 204, 88 P 798; as section 4764, Revised Codes, in *In re Estate of Peterson*, 49 M 96, 98, 140 P 237; *Philbrick v. American*

Bank & Trust Co., 58 M 376, 389, 193 P 59; *In re Spriggs' Estate*, 70 M 272, 274, 281, 225 P 617; *In re Yergy's Estate*, 106 M 505, 511, 79 P 2d 555; *Blacker v. Thatcher*, 145 F 2d 255, 259; *In re Strode's Estate*, — M —, 167 P 2d 579, 581.

91-203. (7018) Rules of interpretation. In interpreting a will, subject to the law of this state, the rules prescribed by the following sections of this chapter are to be observed, unless an intention to the contrary clearly appears.

History: En. Sec. 476, p. 356, L. 1877; re-en. Sec. 476, 2nd Div. Rev. Stat. 1879; re-en. Sec. 476, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1772, Civ. C. 1895; re-en. Sec. 4765, Rev. C. 1907; re-en. Sec. 7018, R. C. M. 1921. Cal. Civ. C. Sec. 1319. Field Civ. C. Sec. 581.

References

In re Yergy's Estate, 106 M 505, 511, 79 P 2d 555.

Wills⌚435-437.

69 C.J. Wills § 1117 et seq.

91-204. (7019) Several instruments are to be taken together. Several testamentary instruments, executed by the same testator, are to be taken and construed together as one instrument.

History: En. Sec. 477, p. 356, L. 1877; re-en. Sec. 477, 2nd Div. Rev. Stat. 1879; re-en. Sec. 477, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1773, Civ. C. 1895; re-en. Sec. 4766, Rev. C. 1907; re-en. Sec. 7019, R. C. M. 1921. Cal. Civ. C. Sec. 1320. Field Civ. C. Sec. 582.

may be construed with one having that character for the purpose of determining whether the writings, taken together, constitute a will; if the former, by appropriate reference, is clearly referred to and made a part of the latter, it is a part of the will; otherwise, it is not. *In re Noyes' Estate*, 40 M 231, 238, 106 P 355.

Operation and Effect

A letter not intended to be a will is not a holographic will; an instrument, however, not of a testamentary character,

Wills⌚474-476.

69 C.J. Wills § 1162 et seq.

91-205. (7020) Harmonizing various parts. All the parts of a will are to be construed in relation to each other, so as, if possible, to form one consistent whole; but where several parts are absolutely irreconcilable, the latter must prevail.

History: En. Sec. 478, p. 356, L. 1877; re-en. Sec. 478, 2nd Div. Rev. Stat. 1879; re-en. Sec. 478, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1774, Civ. C. 1895; re-en. Sec. 4767, Rev. C. 1907; re-en. Sec. 7020, R. C. M. 1921. Cal. Civ. C. Sec. 1321. Field Civ. C. Sec. 583.

re McLure's Estate, 63 M 536, 541, 208 P 900.

References

Cited or applied as section 4767, Revised Codes, in *Philbrick v. American Bank & Trust Co.*, 58 M 376, 389, 193 P 59; *In re Yergy's Estate*, 106 M 505, 512, 79 P 2d 555; *In re Strode's Estate*, — M —, 167 P 2d 579, 581.

Wills⌚469-473.

69 C.J. Wills § 1154 et seq.

Operation and Effect

That construction of a will must be favored which will reconcile with testator's intention the several provisions thereof. In

91-206. (7021) In what case devise not affected. A clear and distinct devise or bequest cannot be affected by any reasons assigned therefor, or by any other words not equally clear and distinct, or by inference or argument from other parts of the will, or by an inaccurate recital of or reference to its contents in another part of the will.

History: En. Sec. 479, p. 356, L. 1877; re-en. Sec. 479, 2nd Div. Rev. Stat. 1879;

re-en. Sec. 479, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1775, Civ. C. 1895; re-en. Sec.

4768, Rev. C. 1907; re-en. Sec. 7021, R. C. M. 1921. Cal. Civ. C. Sec. 1322. Field Civ. C. Sec. 584.

Wills—455, 467, 471.

69 C. J. Wills §§ 1126 et seq., 1154 et seq.

91-207. (7022) When ambiguous or doubtful. Where the meaning of any part of a will is ambiguous or doubtful, it may be explained by any reference thereto, or recital thereof, in another part of the will.

History: En. Sec. 480, p. 356, L. 1877; re-en. Sec. 480, 2nd Div. Rev. Stat. 1879; re-en. Sec. 480, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1776, Civ. C. 1895; re-en. Sec. 4769, Rev. C. 1907; re-en. Sec. 7022, R. C. M. 1921. Cal. Civ. C. Sec. 1323. Field Civ. C. Sec. 585.

References

In re Yergy's Estate, 106 M 505, 512, 79 P 2d 555; In re Irvine's Estate, 114 M 577, 581, 139 P 2d 489; In re Strobe's Estate, ___ M ___, 167 P 2d 579, 581.

Wills—468-473.

69 C.J. Wills § 1154 et seq.

91-208. (7023) Words taken in ordinary sense. The words of a will are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected, and that other can be ascertained.

History: En. Sec. 481, p. 357, L. 1877; re-en. Sec. 481, 2nd Div. Rev. Stat. 1879; re-en. Sec. 481, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1777, Civ. C. 1895; re-en. Sec. 4770, Rev. C. 1907; re-en. Sec. 7023, R. C. M. 1921. Cal. Civ. C. Sec. 1324. Field Civ. C. Sec. 586.

Words Construed

(Children) Where a will bequeathed one-half of the testator's estate to his two sisters and the other half to their children if living at the time of his death, and both sisters had died before the will was made leaving no children, the word "children" used in the will could not, under the rules of construction of wills laid down by this section and section 91-224, be construed as including grandchildren so as to permit a grandson of one of the sisters to share in the estate. In re Estate of Hash, 64 M 118, 121, 208 P 605.

(Effects) A will made preparatory to taking a degree in a secret society by a man of more than ordinary ability who had held high state office and otherwise had enjoyed extensive business experience, reading: "I hereby give, devise and bequeath all my goods, chattels and effects to my wife," held to pass all of his property, both real and personal, the word "effects," though generally including only personal property, being broad enough to compass real estate. (Mr. Justice Stark dissenting.) In re Spriggs' Estate, 70 M 272, 274, 225 P 617.

(Employees) What individuals are not "employees" within the meaning of a will. In re Klein's Estate, 35 M 185, 204, 88 P 798.

(Endowed) The widow under the will was "endowed in his estate, real and personal." In a proceeding seeking to debar the widow from nominating an administrator with the will annexed, held that the testator by the use of the word "endowed" did not intend that she should be limited to her right of dower—a third part of his real property—but did intend that she should have the same portion of his estate, both real and personal, to which she would have been entitled had he died intestate. In re McClure's Estate, 63 M 536, 541, 208 P 900.

(Firm) The word "firm" in a will held to have been used by the testator in its ordinary rather than its legal sense. In re Klein's Estate, 35 M 185, 204, 88 P 798.

(Less a note of two thousand dollars) Where a testator had made a bequest of three thousand dollars, "less a note of two thousand dollars," held by him against the beneficiary, the quoted words would, in ordinary business transactions, have reference to the debt as a whole, and not to the sum mentioned as principal only, and should therefore be assigned their ordinary meaning. In re Beck's Estate, 44 M 561, 578, 121 P 784.

References

In re Yergy's Estate, 106 M 505, 512, 79 P 2d 555; In re Irvine's Estate, 114 M 577, 581, 139 P 2d 489; Blacker v. Thatcher, 145 F 2d 255, 259.

Wills—456.

69 C.J. Wills § 1128.

57 Am. Jur., Wills, §§ 1147-1156.

91-209. (7024) Words to receive an operative construction. The words of a will are to receive an interpretation which will give to every expression

some effect, rather than one which will render any of the expressions inoperative.

History: En. Sec. 482, p. 357, L. 1877; re-en. Sec. 482, 2nd Div. Rev. Stat. 1879; re-en. Sec. 482, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1778, Civ. C. 1895; re-en. Sec. 4771, Rev. C. 1907; re-en. Sec. 7024, R. C. M. 1921. Cal. Civ. C. Sec. 1325. Field Civ. C. Sec. 587.

References

In re Spriggs' Estate, 70 M 272, 274, 225 P 617; In re Yergy's Estate, 106 M 505, 512, 79 P 2d 555; In re Irvine's Estate, 114 M 577, 581, 139 P 2d 489.

Wills \Rightarrow 448.

69 C.J. Wills § 1147.

91-210. (7025) Intestacy to be avoided. Of two modes of interpreting a will, that is to be preferred which will prevent a total intestacy.

History: En. Sec. 483, p. 357, L. 1877; re-en. Sec. 483, 2nd Div. Rev. Stat. 1879; re-en. Sec. 483, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1779, Civ. C. 1895; re-en. Sec. 4772, Rev. C. 1907; re-en. Sec. 7025, R. C. M. 1921. Cal. Civ. C. Sec. 1326. Field Civ. C. Sec. 588.

Operation and Effect

In the construction of a will that construction is to be adopted, if possible, which will prevent a partial intestacy. In re Spriggs' Estate, 70 M 272, 275, 225 P 617.

A will must be construed according to the intention of the testator and so as to avoid total intestacy, if possible. In re Hauge's Estate, 92 M 36, 44, 9 P 2d 1065.

Under Montana law, of two modes of interpretation of a will, that is to be preferred which will prevent intestacy, either total or partial. In cases involving the construction of wills, fixed rules for the interpretation of writings yield to the basic principle that the thing to be sought for is the intention of the testator. Blacker v. Thatcher, 145 F 2d 255, 259.

References

Cited or applied as section 4772, Revised Codes, in In re Noyes' Estate, 40 M 231, 238, 106 P 355; In re Irvine's Estate, 114 M 577, 581, 139 P 2d 489; In re Strode's Estate, — M —, 167 P 2d 579, 581.

91-211. (7026) Effect of technical words. Technical words in a will are to be taken in their technical sense, unless the context clearly indicates a contrary intention.

History: En. Sec. 484, p. 357, L. 1877; re-en. Sec. 484, 2nd Div. Rev. Stat. 1879; re-en. Sec. 484, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1780, Civ. C. 1895; re-en. Sec. 4773, Rev. C. 1907; re-en. Sec. 7026, R. C. M. 1921. Cal. Civ. C. Sec. 1327. Field Civ. C. Sec. 589.

M. 1921. Cal. Civ. C. Sec. 1327. Field Civ. C. Sec. 589.

Wills \Rightarrow 457.

69 C.J. Wills § 1129 et seq.

91-212. (7027) Technical words not necessary. Technical words are not necessary to give effect to any species of disposition by a will.

History: En. Sec. 485, p. 357, L. 1877; re-en. Sec. 485, 2nd Div. Rev. Stat. 1879; re-en. Sec. 485, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1781, Civ. C. 1895; re-en. Sec. 4774, Rev. C. 1907; re-en. Sec. 7027, R. C. M. 1921. Cal. Civ. C. Sec. 1328. Field Civ. C. Sec. 590.

Operation and Effect

The word "firm," in a will held not to have been used in its technical legal sense. In re Klein's Estate, 35 M 185, 204, 88 P 798.

91-213. (7028) Certain words not necessary to pass a fee. The term "heirs," or other words of inheritance, are not requisite to devise a fee, and a devise of real property passes all the estate of the testator, unless otherwise limited.

History: En. Sec. 486, p. 357, L. 1877; re-en. Sec. 486, 2nd Div. Rev. Stat. 1879; re-en. Sec. 486, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1782, Civ. C. 1895; re-en. Sec. 4775, Rev. C. 1907; re-en. Sec. 7028, R. C. M. 1921. Cal. Civ. C. Sec. 1329. Field Civ. C. Sec. 591.

M. 1921. Cal. Civ. C. Sec. 1329. Field Civ. C. Sec. 591.

Wills \Rightarrow 597.

69 C.J. Wills § 1496 et seq.

91-214. (7029) Power to devise—how executed by terms of will. Real or personal property embraced in a power to devise passes by a will purporting to devise all the real or personal property of the testator.

History: En. Sec. 487, p. 357, L. 1877; re-en. Sec. 487, 2nd Div. Rev. Stat. 1879; re-en. Sec. 487, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1783, Civ. C. 1895; re-en. Sec. 4776, Rev. C. 1907; re-en. Sec. 7029, R. C. M. 1921. Cal. Civ. C. Sec. 1330. Field Civ. C. Sec. 592.

Wills⌚589.

49 C.J. Powers, § 122 et seq.; 69 C.J. Wills, § 1947 et seq.

91-215. (7030) Devise or bequest of all real or personal property, or both. A devise or bequest of all the testator's real or personal property, in express terms, or in any other terms denoting his intent to dispose of all his real or personal property, passes all the real or personal property which he was entitled to dispose of by will at the time of his death.

History: En. Sec. 488, p. 358, L. 1877; re-en. Sec. 488, 2nd Div. Rev. Stat. 1879; re-en. Sec. 488, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1784, Civ. C. 1895; re-en. Sec. 4777, Rev. C. 1907; re-en. Sec. 7030, R. C. M. 1921. Cal. Civ. C. Sec. 1331. Field Civ. C. Sec. 593.

References

In re Fratt's Estate, 60 M 526, 537, 199 P 711.

Wills⌚583.

69 C.J. Wills § 1387 et seq.

91-216. (7031) Residuary clause—devise of residue—effect. A devise of the residue of the testator's real property passes all the real property which he was entitled to devise at the time of his death, not otherwise effectually devised by his will.

History: En. Sec. 489, p. 358, L. 1877; re-en. Sec. 489, 2nd Div. Rev. Stat. 1879; re-en. Sec. 489, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1785, Civ. C. 1895; re-en. Sec. 4778, Rev. C. 1907; re-en. Sec. 7031, R. C. M. 1921. Cal. Civ. C. Sec. 1332. Field Civ. C. Sec. 594.

References

In re Fratt's Estate, 60 M 526, 537, 199 P 711.

Wills⌚587.

69 C.J. Wills § 1472 et seq.

57 Am. Jur., Wills, §§ 1415-1423.

91-217. (7032) Same—bequest of residue—effect. A bequest of the residue of the testator's personal property passes all the personal property which he was entitled to bequeath at the time of his death, not otherwise effectually bequeathed by his will.

History: En. Sec. 490, p. 358, L. 1877; re-en. Sec. 490, 2nd Div. Rev. Stat. 1879; re-en. Sec. 490, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1786, Civ. C. 1895; re-en. Sec. 4779, Rev. C. 1907; re-en. Sec. 7032, R. C.

M. 1921. Cal. Civ. C. Sec. 1333. Based on Field Civ. C. Sec. 595.

References

In re Fratt's Estate, 60 M 526, 537, 199 P 711.

91-218. (7033) "Heirs," "relatives," "issue," "descendants," etc. A testamentary disposition to "heirs," "relations," "nearest relations," "representatives," "legal representatives," or "personal representatives," or "family," "issue," "descendants," "nearest," or "next of kin," of any person, without words of qualification, and when the terms are used as words of donation, and not of limitation, vests the property in those who would be entitled to succeed to the property of such person, according to the provisions of the chapter on succession in this code.

History: En. Sec. 491, p. 358, L. 1877; re-en. Sec. 491, 2nd Div. Comp. Stat. 1887; re-en. Sec. 491, 2nd Div. Rev. Stat. 1879; re-en. Sec. 1787, Civ. C. 1895; re-en. Sec.

4780, Rev. C. 1907; re-en. Sec. 7033, R. C. M. 1921. Cal. Civ. C. Sec. 1334. Field Civ. C. Sec. 596.

References

In re Bernheim's Estate, 82 M 198, 206, 266 P 378.

Wills⇨492-513.

69 C.J. Wills § 1190 et seq.

57 Am. Jur., Wills, §§ 1302-1318, 1363-1398.

91-219. (7034) Words of donation and of limitation. The terms mentioned in the last section are used as words of donation, and not of limitation, when the property is given to the person so designated directly, and not as a qualification of an estate given to the ancestor of such person.

History: En. Sec. 492, p. 358, L. 1877; re-en. Sec. 492, 2nd Div. Rev. Stat. 1879; re-en. Sec. 492, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1788, Civ. C. 1895; re-en. Sec. 4781, Rev. C. 1907; re-en. Sec. 7034, R. C. M. 1921. Cal. Civ. C. Sec. 1335. Field Civ. C. Sec. 597.

Wills⇨591.

69 C.J. Wills § 1488 et seq.

91-220. (7035) To what time words refer. Words in a will referring to death or survivorship, simply, relate to the time of the testator's death, unless possession is actually postponed, when they must be referred to the time of possession.

History: En. Sec. 493, p. 358, L. 1877; re-en. Sec. 493, 2nd Div. Rev. Stat. 1879; re-en. Sec. 493, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1789, Civ. C. 1895; re-en. Sec. 4782, Rev. C. 1907; re-en. Sec. 7035, R. C. M. 1921. Cal. Civ. C. Sec. 1336. Field Civ. C. Sec. 598.

Wills⇨481.

69 C.J. Wills § 1168 et seq.

91-221. (7036) Devise or bequest to a class. A testamentary disposition to a class includes every person answering the description at the testator's death; but when the possession is postponed to a future period, it includes also all persons coming within the description before the time to which possession is postponed.

History: En. Sec. 494, p. 358, L. 1877; re-en. Sec. 494, 2nd Div. Rev. Stat. 1879; re-en. Sec. 494, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1790, Civ. C. 1895; re-en. Sec. 4783, Rev. C. 1907; re-en. Sec. 7036, R. C. M. 1921. Cal. Civ. C. Sec. 1337. Field Civ. C. Sec. 599.

Wills⇨524.

69 C.J. Wills § 1267 et seq.

57 Am. Jur., Wills, §§ 1256 et seq.

91-222. (7037) When conversion takes effect. When a will directs the conversion of real property into money, such property and all its proceeds must be deemed personal property from the time of the testator's death.

History: En. Sec. 495, p. 359, L. 1877; re-en. Sec. 495, 2nd Div. Rev. Stat. 1879; re-en. Sec. 495, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1791, Civ. C. 1895; re-en. Sec. 4784, Rev. C. 1907; re-en. Sec. 7037, R. C. M. 1921. Cal. Civ. C. Sec. 1338. Field Civ. C. Sec. 600.

the conversion of real property into money and turned over to the executor, equitable conversion takes place upon the death of the testator, and the real estate must thereafter be treated as personality. In re Livingston's Estate, 91 M 584, 595, 9 P 2d 159.

Operation and Effect

Under this section where a will directs

Conversion⇨14-19.

17 C.J.S. Conversion §§ 16-21, 24, 29.

91-223. (7038) When child born after testator's death takes under will. A child conceived before, but not born until after a testator's death, or any other period when a disposition to a class vests in right or in possession, takes, if answering to the description of the class.

History: En. Sec. 496, p. 359, L. 1877; re-en. Sec. 496, 2nd Div. Rev. Stat. 1879; re-en. Sec. 496, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1792, Civ. C. 1895; re-en. Sec. 4785, Rev. C. 1907; re-en. Sec. 7038, R.

C. M. 1921. Cal. Civ. C. Sec. 1339. Field Civ. C. Sec. 601.

Wills—497(7).

69 C.J. Wills § 1198 et seq.

91-224. (7039) Mistakes and omissions. When, applying a will, it is found that there is an imperfect description, or that no person or property exactly answers the description, mistakes and omissions must be corrected, if the error appears from the context of the will or from extrinsic evidence; but evidence of the declarations of the testator as to his intentions cannot be received.

History: En. Sec. 497, p. 359, L. 1877; re-en. Sec. 497, 2nd Div. Rev. Stat. 1879; re-en. Sec. 497, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1793, Civ. C. 1895; re-en. Sec. 4786, Rev. C. 1907; re-en. Sec. 7039, R. C. M. 1921. Cal. Civ. C. Sec. 1340. Based on Field Civ. C. Sec. 602.

Legacy Left to Dead Person or Estate of Deceased Person Void

Where a legacy or devise is left by will to a person who was dead at the time it was executed, it has generally been held, in the absence of statute to the contrary, that the gift lapses even though the fact of such death was known to the testator; it has also been held that a legacy to the estate of a deceased person is void, since an estate is not an entity or person capable of receiving the property willed. In re Doyle's Estate, 107 M 64, 67, 80 P 2d 374.

Operation and Effect

What employees are included as beneficiaries under a will. In re Klein's Estate, 35 M 185, 204, 88 P 798; In re Estate of Peterson, 49 M 96, 99, 140 P 237.

Where a will bequeathed one-half of the testator's estate to his sisters and the other half to their children if living at the time of his death, and both sisters had died be-

fore the will was made leaving no children, the word "children" used in the will could not under the rules of construction of wills laid down by section 91-208, and this section be construed as including grandchildren so as to permit a grandson of one of the sisters to share in the estate. In re the Estate of Hash, 64 M 118, 122, 208 P 605.

Where Indeterminable from Ambiguity Who Entitled

Where testatrix left the sum of \$50 to the estate of a deceased brother "as his share of my estate as heir or otherwise," and the children of the deceased brother who were not mentioned in the will claimed they were entitled to share in the residue, but the residuary clause provided "all the rest and remainder shall be divided between my lawful heirs herein mentioned," held, after considering such extrinsic facts as are allowable under this section in case of ambiguity, that the court is unable to determine who should have the \$50, and that the children of the deceased brother were not entitled to share in the residue. In re Doyle's Estate, 107 M 64, 68, 80 P 2d 374.

Wills—464, 487 (3).

69 C.J. Wills §§ 1143, 1179.

91-225. (7040) When devises and bequests vest. Testamentary dispositions, including devises and bequests to a person on attaining majority, are presumed to vest at the testator's death.

History: En. Sec. 498, p. 359, L. 1877; re-en. Sec. 498, 2nd Div. Rev. Stat. 1879; re-en. Sec. 498, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1794, Civ. C. 1895; re-en. Sec. 4787, Rev. C. 1907; re-en. Sec. 7040, R. C. M. 1921. Cal. Civ. C. Sec. 1341. Field Civ. C. Sec. 603.

Operation and Effect

Before a testator's death, the devisees had a mere privilege, which was revocable by law, but when the will took effect the mere pre-existing privilege was merged into a right. Then it was, if ever, that the right to take vested and became prop-

erty. Hinds v. Wilcox, 22 M 4, 11, 55 P 355.

The property of a testator vests in the devisees from the moment of his death, subject to the right of the executor to its possession for the purposes of administration until the estate is settled or until it is delivered over to them by order of court, the decree of distribution simply releasing the property from the conditions it was subject to during the period of administration. In re Estate of Deschamps, 65 M 207, 212, 212 P 512.

Where by a will a testator devised his estate to his executors in trust, they to

pay the income therefrom to the "children" of his son in equal shares, the principal thereof to be paid to each heir on attaining majority, the trustees, on rendering account of their stewardship held to have properly paid a proportionate share of the income to the guardian of the son's child born after the testator's death and before the oldest of his children had reached majority, the contention of objecting heirs that the various bequests had vested at the time of the testator's death, thus barring the right of the after-born child to take, not being maintainable, since no one of the objecting children could be vested in possession or title until one of them had obtained majority, title in the meantime vesting in the trustees. In *re* Murphy's Estate, 99 M 114, 122, 43 P 2d 233.

The property of a testator, both real and personal, vests in the devisees and legatees at the moment of his death, with possession thereof passed to the personal representative subject to the control of the district court for administration purposes. In *re* Clark's Estate, 105 M 401, 412, 74 P 2d 401.

91-226. (7041) When cannot be divested. A testamentary disposition, when vested, cannot be divested unless upon the occurrence of the precise contingency prescribed by the testator for that purpose.

History: En. Sec. 499, p. 359, L. 1877; re-en. Sec. 499, 2nd Div. Rev. Stat. 1879; re-en. Sec. 499, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1795, Civ. C. 1895; re-en. Sec. 4788, Rev. C. 1907; re-en. Sec. 7041, R. C. M. 1921. Cal. Civ. C. Sec. 1342. Field Civ. C. Sec. 604.

91-227. (7042) Death of devisee or legatee. If a devisee or legatee dies during the lifetime of the testator, the testamentary disposition to him fails, unless an intention appears to substitute some other in his place, except as provided in section 91-139.

History: En. Sec. 500, p. 359, L. 1877; re-en. Sec. 500, 2nd Div. Rev. Stat. 1879; re-en. Sec. 500, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1796, Civ. C. 1895; re-en. Sec. 4789, Rev. C. 1907; re-en. Sec. 7042, R. C. M. 1921. Cal. Civ. C. Sec. 1343. Field Civ. C. Sec. 605.

Intentional Substitution of Surviving Legatees

The residuary clause covers all legacies which lapse due to death of legatee before death of testator, in the absence of an intention of the testator to substitute another recipient; held that a declaration in the residuary clause "or to the survivor or survivors of said persons," entitled the survivors of those named in the residuary

Title to the testator's real estate vests in the devisees from the moment of his death, subject to the right of the executor to its possession for the purposes of administration until the estate is settled or until it is delivered over to them by order of the court. In *re* Armesworthy's Estate, 117 M 602, 609, 160 P 2d 472.

Rights to testator's or intestate's property vest under this section immediately on testator's death. In *re* Nossen's Estate, — M —, 162 P 2d 216, 217.

References

Cited or applied as section 1794, Civil Code, in *Gelsthorpe v. Furnell*, 20 M 299, 310, 51 P 267; In *re* Smith's Estate, 60 M 276, 298, 199 P 696; In *re* Fratt's Estate, 60 M 526, 537, 199 P 711; *Rumney et al. v. Skinner*, 64 M 75, 82, 208 P 895; In *re* Connolly's Estate, 73 M 35, 65, 235 P 408.

Wills—628-638.

69 C.J. Wills §§ 1672, 1687, 1714, 1721, 1722 et seq., 1732.

57 Am. Jur., Wills, §§ 1216 et seq.

References

In *re* Murphy's Estate, 99 M 114, 43 P 2d 233.

Wills—636.

69 C.J. Wills § 1741 et seq.

clause to the deceased legatee's share of the residue, under this section. Sec. 91-139, declaring that estate devised to a child or other relation of the testator goes to lineal descendants of a deceased devisee, if any, refers only to real property, and does not apply when testator made a substitution under this section. *Converse v. Byars*, 112 M 372, 374, 118 P 2d 144.

References

In *re* Fratt's Estate, 60 M 526, 537, 199 P 711.

Wills—536-540.

69 C.J. Wills § 1342 et seq.

57 Am. Jur., Wills, § 1425.

91-228. (7043) Interests in remainder are not affected. The death of a devisee or legatee of a limited interest before the testator's death does not defeat the interests of persons in remainder, who survive the testator.

History: En. Sec. 501, p. 359, L. 1877; re-en. Sec. 501, 2nd Div. Rev. Stat. 1879; re-en. Sec. 501, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1797, Civ. C. 1895; re-en. Sec. 4790, Rev. C. 1907; re-en. Sec. 7043, R. C. M. 1921. Cal. Civ. C. Sec. 1344. Field Civ. C. Sec. 606.

References

In re Fratt's Estate, 60 M 526, 537, 199 P 711.

Wills—777.

69 C.J. Wills § 2255 et seq.

91-229. (7044) Conditional devises and bequests. A conditional disposition is one which depends upon the occurrence of some uncertain event, by which it is either to take effect or be defeated.

History: En. Sec. 502, p. 360, L. 1877; re-en. Sec. 502, 2nd Div. Rev. Stat. 1879; re-en. Sec. 502, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1798, Civ. C. 1895; re-en. Sec. 4791, Rev. C. 1907; re-en. Sec. 7044, R.

C. M. 1921. Cal. Civ. C. Sec. 1345. Field Civ. C. Sec. 607.

Wills—639.

69 C.J. Wills § 1751 et seq.

57 Am. Jur., Wills, §§ 1503-1525.

91-230. (7045) Condition precedent defined. A condition precedent in a will is one which is required to be fulfilled before a particular disposition takes effect.

History: En. Sec. 503, p. 360, L. 1877; re-en. Sec. 503, 2nd Div. Rev. Stat. 1879; re-en. Sec. 503, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1799, Civ. C. 1895; re-en. Sec.

4792, Rev. C. 1907; re-en. Sec. 7045, R. C. M. 1921. Cal. Civ. C. Sec. 1346. Field Civ. C. Sec. 608.

91-231. (7046) Effect of condition precedent. Where a testamentary disposition is made upon a condition precedent, nothing vests until the condition is fulfilled, except where such fulfillment is impossible, in which case the disposition vests, unless the condition was the sole motive thereof, and the impossibility was unknown to the testator, or arose from an unavoidable event subsequent to the execution of the will.

History: En. Sec. 504, p. 360, L. 1877; re-en. Sec. 504, 2nd Div. Rev. Stat. 1879; re-en. Sec. 504, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1800, Civ. C. 1895; re-en. Sec. 4793, Rev. C. 1907; re-en. Sec. 7046, R.

C. M. 1921. Cal. Civ. C. Sec. 1347. Field Civ. C. Sec. 609.

Wills—657.

69 C.J. Wills § 1783 et seq.

91-232. (7047) Conditions precedent—when deemed performed. A condition precedent in a will is to be deemed performed when the testator's intention has been substantially, though not literally, complied with.

History: En. Sec. 505, p. 360, L. 1877; re-en. Sec. 505, 2nd Div. Rev. Stat. 1879; re-en. Sec. 505, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1801, Civ. C. 1895; re-en. Sec. 4794, Rev. C. 1907; re-en. Sec. 7047, R. C. M. 1921. Cal. Civ. C. Sec. 1348. Field Civ. C. Sec. 610.

References

Cited or applied as section 1801, Civil Code, in In re Klein's Estate, 35 M 185, 204, 88 P 798; In re Irvine's Estate, 114 M 577, 581, 139 P 2d 489.

Wills—659-665.

69 C.J. Wills § 1794 et seq.

91-233. (7048) Condition subsequent defined. A condition subsequent is where an estate or interest is so given as to vest immediately, subject only to be divested by some subsequent act or event.

History: En. Sec. 506, p. 360, L. 1877; re-en. Sec. 506, 2nd Div. Rev. Stat. 1879;

re-en. Sec. 506, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1802, Civ. C. 1895; re-en. Sec.

4795, Rev. C. 1907; re-en. Sec. 7048, R. C. M. 1921. Cal. Civ. C. Sec. 1349. Field Civ. C. Sec. 611.

Wills—639.

69 C. J. Wills § 1751 et seq.

91-234. (7049) Devisees, etc., take as tenants in common. A devise or legacy given to more than one person vests in them as owners in common.

History: En. Sec. 507, p. 360, L. 1877; re-en. Sec. 507, 2nd Div. Rev. Stat. 1879; re-en. Sec. 507, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1803, Civ. C. 1895; re-en. Sec. 4796, Rev. C. 1907; re-en. Sec. 7049, R. C. M. 1921. Cal. Civ. C. Sec. 1350. Field Civ. C. Sec. 612.

who claims ownership, is not one to recover the stock for the benefit of the estate, but one brought as tenant in common of the property under this section, and may be maintained without joining the other devisees or the executors. *Barker v. Edwards*, 259 Fed. 484, 489.

Operation and Effect

A suit by a legatee or devisee of stock in a Montana corporation, which owned real estate, but which had been dissolved by expiration of its term of incorporation, to recover her interest from a third person

References

In re Fratt's Estate, 60 M 526, 537, 199 P 711.

Wills—627.

69 C.J. Wills § 1645 et seq.

91-235. (7050) Advancements — when adempptions. Advancements or gifts are not to be taken as adempptions of general legacies, unless such intention is expressed by the testator in writing.

History: En. Sec. 508, p. 360, L. 1877; re-en. Sec. 508, 2nd Div. Rev. Stat. 1879; re-en. Sec. 508, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1804, Civ. C. 1895; re-en. Sec. 4797, Rev. C. 1907; re-en. Sec. 7050, R.

C. M. 1921. Cal. Civ. C. Sec. 1351. Field Civ. C. Sec. 613.

Wills—763-771.

69 C.J. Wills §§ 2199 et seq.

57 Am. Jur., Wills, §§ 1579-1605.

CHAPTER 3

WILLS—GENERAL PROVISIONS

- Section 91-301. Nature and designation of legacies: 1. Specific—2. Demonstrative—3. Annuities—4. Residuary—5. General.
- 91-302. Estates chargeable.
- 91-303. Order of resort to estate for debts.
- 91-304. Same—for payment of legacies.
- 91-305. Same—legacies to kindred.
- 91-306. Abatement.
- 91-307. Specific devises and legacies.
- 91-308. Heirs' conveyance good, unless will is proved within four years.
- 91-310. Bequest of interest.
- 91-311. Satisfaction.
- 91-312. Legacies—when due.
- 91-313. Interest.
- 91-314. Construction of these rules.
- 91-315. Executor according to the tenor.
- 91-316. Power to appoint is invalid.
- 91-317. Executor not to act until qualified.
- 91-318. Execution and construction of prior wills not affected.
- 91-319. The law of what place applies.
- 91-320. Liability of beneficiaries for testator's obligations.

91-301. (7051) Nature and designation of legacies: 1. Specific—2. Demonstrative—3. Annuities—4. Residuary—5. General. Legacies are distinguished and designated, according to their nature, as follows:

1. A legacy of a particular thing, specified and distinguished from all others of the same kind belonging to the testator, is specific; if such legacy fails, resort cannot be had to the other property of the testator.

2. A legacy is demonstrative when the particular fund or personal property is pointed out from which it is to be taken or paid; if such fund or property fails, in whole or in part, resort may be had to the general assets, as in case of a general legacy.

3. An annuity is a bequest of certain specified sums periodically; if the fund or property out of which they are payable fails, resort may be had to the general assets, as in case of a general legacy.

4. A residuary legacy embraces only that which remains after all the bequests of the will are discharged.

5. All other legacies are general legacies.

History: This Act en. Secs. 509-530, pp. 360-363, L. 1877; re-en. Secs. 509-530, 2nd Div. Rev. Stat. 1879; re-en. Secs. 509-530, 2nd Div. Comp. Stat. 1887.

This section re-en. Sec. 1820, Civ. C. 1895; re-en. Sec. 4798, Rev. C. 1907; re-en. Sec. 7051, R. C. M. 1921. Cal. Civ. C. Sec. 1357. Field Civ. C. Sec. 614.

Unconditional Annuity

Where under the terms of the will provision for an annuity payable to the widow of testator was unconditional and abso-

lute, it was payable out of the corpus of the estate, and the executor was not required to withhold it in order to accumulate a fund for the payment of taxes on the property of the estate and thus to avoid the necessity of borrowing money for that purpose. In re Kelley's Estate, 91 M 98, 105, 5 P 2d 559.

Wills—750-756.

69 C.J. Wills § 2079 et seq.

57 Am. Jur., Wills, §§ 1399 et seq.

91-302. (7052) Estates chargeable. When a person dies intestate, all his property, real and personal, without any distinction between them, is chargeable with the payment of his debts, except as otherwise provided in this Title.

History: This Act en. Secs. 509-530, pp. 360-363, L. 1877; re-en. Secs. 509-530, 2nd Div. Rev. Stat. 1879; re-en. Sec. 509-530, 2nd Div. Comp. Stat. 1887.

This section re-en. Sec. 1821, Civ. C. 1895; re-en. Sec. 4799, Rev. C. 1907; re-en. Sec. 7052, R. C. M. 1921. Cal. Civ. C. Sec. 1358.

Operation and Effect

This section, when read in connection with section 91-2801, indicates that all of the property of the estate is subject to the payment of the debts, using that term in its general sense, to include debts, family

allowances, expenses, and charges of administration already accrued and to accrue. Plains Land & Improvement Co. v. Lynch, 38 M 271, 283, 99 P 847.

References

Cited or applied as section 1821, Civil Code, in In re Tuohy's Estate, 33 M 230, 246, 83 P 486; In re Smith's Estate, 60 M 275, 298, 199 P 696; Rumney et al. v. Skinner, 64 M 75, 208 P 895.

Executors and Administrators—270-274.

34 C.J.S. Executors and Administrators § 724 et seq.

91-303. (7053) Order of resort to estate for debts. The property of a testator, except as otherwise specially provided for in this Title, must be resorted to for the payment of debts, in the following order:

1. The property which is expressly appropriated by the will for the payment of the debts;
2. Property not disposed of by will;
3. Property which is devised or bequeathed to a residuary legatee;
4. Property which is not specifically devised or bequeathed; and,
5. All other property ratably. Before any debts are paid, the expenses of the administration and the allowance to the family must be paid or provided for.

History: This Act en. Secs. 509-530, pp. 360-363, L. 1877; re-en. Secs. 509-530, 2nd Div. Rev. Stat. 1879; re-en. Secs. 509-530, 2nd Div. Comp. Stat. 1887.

This section re-en. Sec. 1822, Civ. C. 1895; re-en. Sec. 4800, Rev. C. 1907; re-en. Sec. 7053, R. C. M. 1921. Cal. Civ. C. Sec. 1359.

Operation and Effect

Where sufficient property is not set aside for the payment of debts, devisees claiming devises for a valuable consideration, have no right to have such property exempted from sale for the payment of debts, or the sale thereof postponed until other property specifically devised has been resorted to for that purpose, but all

must be resorted to ratably after property in the first four classes has been exhausted. In re Tuohy's Estate, 33 M 230, 244, 83 P 486.

References

In re Smith's Estate, 60 M 276, 298, 199 P 696; In re Kelley's Estate, 91 M 98, 5 P 2d 559; Erwin v. Mark, 105 M 361, 373, 73 P 2d 537.

21 Am. Jur. 602, Executors and Administrators, §§ 389 et seq.

91-304. (7054) Same—for payment of legacies. The property of a testator, except as otherwise specially provided in this Title, must be resorted to for the payment of legacies, in the following order:

1. The property which is expressly appropriated by the will for the payment of the legacies;
2. Property not disposed of by will;
3. Property which is devised or bequeathed to a residuary legatee;
4. Property which is not specifically devised or bequeathed.

History: This Act en. Secs. 509-530, pp. 360-363, L. 1877; re-en. Secs. 509-530, 2nd Div. Rev. Stat. 1879; re-en. Secs. 509-530, 2nd Div. Comp. Stat. 1887.

This section re-en. Sec. 1823, Civ. C. 1895; re-en. Sec. 4801, Rev. C. 1907; re-en. Sec. 7054, R. C. M. 1921. Cal. Civ. C. Sec. 1360.

References

Cited or applied as section 1823, Civil

Code, in In re Tuohy's Estate, 33 M 230, 246, 83 P 486; In re Fratt's Estate, 60 M 526, 537, 199 P 711; In re Kelley's Estate, 91 M 98, 105, 5 P 2d 559.

Executors and Administrators—326, 327, 329.

34 C.J.S. Executors and Administrators § 543 et seq.

57 Am. Jur., Wills, §§ 1606, 1607.

91-305. (7055) Same—legacies to kindred. Legacies to husband, widow, or kindred of any class are chargeable only after legacies to persons not related to the testator.

History: This Act en. Secs. 509-530, pp. 360-363, L. 1877; re-en. Secs. 509-530, 2nd Div. Rev. Stat. 1879; re-en. Secs. 509-530, 2nd Div. Comp. Stat. 1887.

This section re-en. Sec. 1824, Civ. C. 1895; re-en. Sec. 4802, Rev. C. 1907; re-en. Sec. 7055, R. C. M. 1921. Cal. Civ. C. Sec. 1361. Field Civ. C. Sec. 618.

91-306. (7056) Abatement. Abatement takes place in any class only as between legacies of that class, unless a different intention is expressed in the will.

History: This Act en. Secs. 509-530, pp. 360-363, L. 1877; re-en. Secs. 509-530, 2nd Div. Rev. Stat. 1879; re-en. Secs. 509-530, 2nd Div. Comp. Stat. 1887.

This section re-en. Sec. 1825, Civ. C. 1895; re-en. Sec. 4803, Rev. C. 1907; re-en.

Sec. 7056, R. C. M. 1921. Cal. Civ. C. Sec. 1362. Field Civ. C. Sec. 619.

Wills—804-818.

69 C.J. Wills §§ 2171, 2181, 2182, 2189, 2193.

57 Am. Jur., Wills, §§ 1457 et seq.

91-307. (7057) Specific devises and legacies. In a specific devise or legacy, the title passes by the will, but possession can only be obtained from the personal representative; and he may be authorized by the district court to sell the property devised and bequeathed in the cases herein provided.

History: This Act en. Secs. 509-530, pp. 360-363, L. 1877; re-en. Secs. 509-530, 2nd

Div. Rev. Stat. 1879; re-en. Secs. 509-530, 2nd Div. Comp. Stat. 1887.

This section re-en. Sec. 1826, Civ. C. 1895; re-en. Sec. 4804, Rev. C. 1907; re-en. Sec. 7057, R. C. M. 1921. Cal. Civ. C. Sec. 1363. Field Civ. C. Sec. 620.

Operation and Effect

Rents and profits of real estate specifically devised, when not needed for the payment of debts or for administration purposes, are payable to the devisee and not to the residuary legatee. In re Bradfield's Estate, 69 M 247, 260, 221 P 531.

Id. While it was the duty of an executor not to deliver possession of land specifically devised until the expiration of the

time for filing claims against the estate had expired, and then only upon order of the court, and he acted at his peril in doing otherwise, the court properly refused to compel him to account for the proceeds of a crop raised on the land, to the residuary legatee where they were not needed to pay estate debts or expenses of administration.

References

Cited or applied as section 1826, Civil Code, in In re Tuohy's Estate, 33 M 230, 246, 83 P 486.

91-308. (7058) Heirs' conveyance good, unless will is proved within four years. The rights of a purchaser or encumbrancer of real property, in good faith and for value, derived from any person claiming the same by succession, are not impaired by any devise made by the decedent from whom succession is claimed, unless the instrument containing such devise is duly proved as a will, and recorded in the office of the clerk of the district court having jurisdiction thereof, or unless written notice of such devise is filed with the clerk of the county where the real property is situated, within four years after the devisors' death.

History: This Act en. Secs. 509-530, pp. 360-363, L. 1877; re-en. Secs. 509-530, 2nd Div. Rev. Stat. 1879; re-en. Secs. 509-530, 2nd Div. Comp. Stat. 1887.

This section re-en. Sec. 1827, Civ. C. 1895; re-en. Sec. 4805, Rev. C. 1907; re-en. Sec. 7058, R. C. M. 1921. Cal. Civ. C. Sec. 1364. Field Civ. C. Sec. 621.

Descent and Distribution 84; Vendor and Purchaser 239(1).

26 C.J.S. Descent and Distribution § 74 et seq; 66 C.J. Vendor and Purchaser § 1048.

91-309. (7059) Specific legacy for life only — inventory — contents. When specific legacies are for life only, the first legatee must sign and deliver to the second legatee, or if there is none, to the personal representative, an inventory of the property, expressing that the same is in his custody for life only, and that, on his decease, it is to be delivered and to remain to the use and for the benefit of the second legatee, or to the personal representative, as the case may be.

History: This Act en. Secs. 509-530, pp. 360-363, L. 1877; re-en. Secs. 509-530, 2nd Div. Rev. Stat. 1879; re-en. Secs. 509-530, 2nd Div. Comp. Stat. 1887.

This section re-en. Sec. 1828, Civ. C. 1895; re-en. Sec. 4806, Rev. C. 1907; re-en.

Sec. 7059, R. C. M. 1921. Cal. Civ. C. Sec. 1365. Field Civ. C. Sec. 622.

Executors and Administrators 300.

34 C.J.S. Executors and Administrators § 492.

91-310. (7060) Bequest of interest. In case of a bequest of the interest or income of a certain sum or fund, the income accrues from the testator's death.

History: This Act en. Secs. 509-530, pp. 360-363, L. 1877; re-en. Secs. 509-530, 2nd Div. Rev. Stat. 1879; re-en. Secs. 509-530, 2nd Div. Comp. Stat. 1887.

This section re-en. Sec. 1829, Civ. C. 1895; re-en. Sec. 4807, Rev. C. 1907; re-en.

Sec. 7060, R. C. M. 1921. Cal. Civ. C. Sec. 1366. Field Civ. C. Sec. 623.

Wills 733(8).

69 C.J. Wills § 2129 et seq.

91-311. (7061) Satisfaction. A legacy, or a gift in contemplation, fear, or peril of death, may be satisfied before death.

History: This Act en. Secs. 509-530, pp. 360-363, L. 1877; re-en. Secs. 509-530, 2nd Div. Rev. Stat. 1879; re-en. Secs. 509-530, 2nd Div. Comp. Stat. 1887.

This section re-en. Sec. 1830, Civ. C. 1895; re-en. Sec. 4808, Rev. C. 1907; re-en. Sec. 7061, R. C. M. 1921. Cal. Civ. C. Sec. 1367. Based on Field Civ. C. Sec. 624.

Cross-Reference

Gifts causa mortis, secs. 67-1709 to 67-1713.

Gifts 77; Wills 772.

38 C.J.S. Gifts §§ 96, 97; 69 C.J. Wills § 1925.

91-312. (7062) Legacies—when due. Legacies are due and deliverable at the expiration of one year after the testator's decease. Annuities commence at the testator's decease.

History: This Act en. Secs. 509-530, pp. 360-363, L. 1877; re-en. Secs. 509-530, 2nd Div. Rev. Stat. 1879; re-en. Secs. 509-530, 2nd Div. Comp. Stat. 1887.

This section re-en. Sec. 1831, Civ. C. 1895; re-en. Sec. 4809, Rev. C. 1907; re-en. Sec. 7062, R. C. M. 1921. Cal. Civ. C. Sec. 1368. Field Civ. C. Sec. 625.

91-313. (7063) Interest. Legacies bear interest from the time when they are due and payable, except that legacies for maintenance, or to the testator's widow, bear interest from the testator's decease.

History: This Act en. Secs. 509-530, pp. 360-363, L. 1877; re-en. Secs. 509-530, 2nd Div. Rev. Stat. 1879; re-en. Secs. 509-530, 2nd Div. Comp. Stat. 1887.

This section re-en. Sec. 1832, Civ. C. 1895; re-en. Sec. 4810, Rev. C. 1907; re-en. Sec. 7063, R. C. M. 1921. Cal. Civ. C. Sec. 1369. Field Civ. C. Sec. 626.

91-314. (7064) Construction of these rules. The four preceding sections are in all cases to be controlled by a testator's express intention.

History: This Act en. Secs. 509-530, pp. 360-363, L. 1877; re-en. Secs. 509-530, 2nd Div. Rev. Stat. 1879; re-en. Secs. 509-530, 2nd Div. Comp. Stat. 1887.

Sec. 7064, R. C. M. 1921. Cal. Civ. C. Sec. 1370. Field Civ. C. Sec. 627.

This section re-en. Sec. 1833, Civ. C. 1895; re-en. Sec. 4811, Rev. C. 1907; re-en.

Wills 733, 734, 772.

69 C.J. Wills §§ 1925, 2628 et seq., 2640 et seq.

91-315. (7065) Executor according to the tenor. Where it appears, by the terms of a will, that it was the intention of the testator to commit the execution thereof and the administration of his estate to any person as executor, such person, although not named executor, is entitled to letters testamentary in like manner as if he had been made executor.

History: This Act en. Secs. 509-530, pp. 360-363, L. 1877; re-en. Secs. 509-530, 2nd Div. Rev. Stat. 1879; re-en. Secs. 509-530, 2nd Div. Comp. Stat. 1887.

Sec. 7065, R. C. M. 1921. Cal. Civ. C. Sec. 1371. Field Civ. C. Sec. 628.

This section re-en. Sec. 1834, Civ. C. 1895; re-en. Sec. 4812, Rev. C. 1907; re-en.

Wills 513.

69 C.J. Wills § 1255 et seq.

91-316. (7066) Power to appoint is invalid. An authority to an executor to appoint an executor is void.

History: This Act en. Secs. 509-530, pp. 360-363, L. 1877; re-en. Secs. 509-530, 2nd Div. Rev. Stat. 1879; re-en. Secs. 509-530, 2nd Div. Comp. Stat. 1887.

Sec. 7066, R. C. M. 1921. Cal. Civ. C. Sec. 1372. Field Civ. C. Sec. 629.

This section re-en. Sec. 1835, Civ. C. 1895; re-en. Sec. 4813, Rev. C. 1907; re-en.

Executors and Administrators 14.

33 C.J.S. Executors and Administrators §§ 23-27.

91-317. (7067) Executor not to act until qualified. No person has any power, as an executor, until he qualifies, except that, before letters have been issued, he may pay funeral charges and take necessary measures for the preservation of the estate.

History: This Act en. Secs. 509-530, pp. 360-363, L. 1877; re-en. Secs. 509-530, 2nd Div. Rev. Stat. 1879; re-en. Secs. 509-530, 2nd Div. Comp. Stat. 1887.

This section re-en. Sec. 1836, Civ. C. 1895; re-en. Sec. 4814, Rev. C. 1907; re-en.

Sec. 7067, R. C. M. 1921. Cal. Civ. C. Sec. 1373. Field Civ. C. Sec. 630.

Executors and Administrators⇒77.

33 C.J.S. Executors and Administrators § 151.

91-318. (7068) Execution and construction of prior wills not affected. The provisions of this chapter do not impair the validity of the execution of any will made before it takes effect, or affect the construction of any such will.

History: This Act en. Secs. 509-530, pp. 360-363, L. 1877; re-en. Secs. 509-530, 2nd Div. Rev. Stat. 1879; re-en. Secs. 509-530, 2nd Div. Comp. Stat. 1887.

This section re-en. Sec. 1837, Civ. C. 1895; re-en. Sec. 4815, Rev. C. 1907; re-en.

Sec. 7068, R. C. M. 1921. Cal. Civ. C. Sec. 1375.

Wills⇒71, 237, 437.

68 C.J. Wills §§ 7 et seq., 223 et seq.; 69 C.J. Wills §§ 1110 et seq.

91-319. (7069) The law of what place applies. Except as otherwise provided, the validity and interpretation of wills are governed, when relating to real property within this state, by the law of this state; when relating to personal property, by the law of the testator's domicile.

History: This Act en. Secs. 509-530, pp. 360-363, L. 1877; re-en. Secs. 509-530, 2nd Div. Rev. Stat. 1879; re-en. Secs. 509-530, 2nd Div. Comp. Stat. 1887.

This section re-en. Sec. 1838, Civ. C. 1895; re-en. Sec. 4816, Rev. C. 1907; re-en. Sec. 7069, R. C. M. 1921. Cal. Civ. C. Sec. 1376. Field Civ. C. Sec. 635.

this section, the interpretation of his will, so far as the disposition of that property is concerned, is governed by the law of his domicile. In re Coppock's Estate, 72 M 431, 436, 234 P 258.

References

Cited or applied as section 1838, Civil Code, in State ex rel. Ruef v. District Court, 34 M 96, 105, 85 P 866; In re Hauge's Estate, 92 M 36, 42, 9 P 2d 1065.

Wills⇒70, 436.

68 C.J. Wills §§ 251 et seq.; 69 C.J. Wills §§ 1111 et seq.

Operation and Effect

Under the maxim "mobilia sequuntur personam" the legal situs of personal property actually present in this state was in the place of the owner's domicile at the time of his death—in China—and under

91-320. (7070) Liability of beneficiaries for testator's obligations. Those to whom property is given by will are liable for the obligations of the testator in the cases and to the extent prescribed by this Title.

History: This Act en. Secs. 509-530, pp. 360-363, L. 1877; re-en. Secs. 509-530, 2nd Div. Rev. Stat. 1879; re-en. Secs. 509-530, 2nd Div. Comp. Stat. 1887.

This section re-en. Sec. 1839, Civ. C. 1895; re-en. Sec. 4817, Rev. C. 1907; re-en.

Sec. 7070, R. C. M. 1921. Cal. Civ. C. Sec. 1377. Field Civ. C. Sec. 636.

Wills⇒829.

69 C.J. Wills § 2557 et seq.

CHAPTER 4

SUCCESSION

- Section 91-401. Succession defined.
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- 91-422. Successor liable for decedent's obligations.

91-401. (7071) Succession defined. Succession is the coming in of another to take the property of one who dies without disposing of it by will.

History: The first act of the territory regulation succession was chapter 3, p. 5, Laws of Second Session 1866; set aside by act of congress of March 2, 1867. The next legislation was section 252, p. 361, Codified Statutes 1871. En. Sec. 531, p. 363, L. 1877; re-en. Sec. 531, 2nd Div. Rev. Stat. 1879; re-en. Sec. 531, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1850, Civ. C. 1895; re-en. Sec. 4818, Rev. C. 1907; re-en. Sec. 7071, R. C. M. 1921. Cal. Civ. C. Sec. 1383. Field Civ. C. Sec. 637.

References

Cited or applied as section 1850, Civil Code, in *In re Tuohy's Estate*, 33 M 230, 246, 83 P 486; *Hoppin v. Long*, 74 M 558, 582, 241 P 636; *In re Mahaffay's Estate*, 79 M 10, 254 P 875.

16 Am. Jur. 763, Descent and Distribution.

91-402. (7072) Intestate estate—to whom passes. The property, both real and personal, of one who dies without disposing of it by will, passes to the heirs of the intestate, subject to the control of the district court, and to the possession of any administrator appointed by that court for the purposes of administration.

History: En. Sec. 532, p. 363, L. 1877; re-en. Sec. 532, 2nd Div. Rev. Stat. 1879; re-en. Sec. 532, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1851, Civ. C. 1895; re-en. Sec. 4819, Rev. C. 1907; re-en. Sec. 7072, R. C. M. 1921. Cal. Civ. C. Sec. 1386.

Profits From Realty Belong to Heirs

Inasmuch as the heir succeeds to the intestate's realty immediately on his death, subject only to the court's control for administration purposes, a special administrator must, if profits from this property come into his hands, include these in his final account as part of the estate belonging to the heir. *In re Williams' Estate*, 55 M 63, 68, 173 P 790.

Right of Administrator to Property

An administrator has a right to the possession of the real estate of the decedent of whose estate he is administrator, and may bring ejectment in his own name as administrator, for the possession of the same, against a trespasser. *Black v. Story*, 7 M 238, 242, 14 P 703. See also *In re Higgins' Estate*, 15 M 474, 485, 39 P 506; *Kohn v. McKinnon*, 90 Fed. 623, 626.

An administrator is not, by virtue of his office, a co-owner with the co-tenants of his decedent in a mining claim. *O'Han-*

lon v. Ruby Gulch Min. Co., 48 M 65, 74, 135 P 913.

Source of Title of Heirs

Title of heirs to property of an estate does not originate in the decree of distribution but comes to them from their ancestor, and settlement and final distribution serve only to release the property from the conditions to which, as the estate of a deceased person, it is subject. *Hoppin v. Long*, 74 M 558, 582, 241 P 636.

See also *State v. District Court et al.*, 76 M 143, 148, 245 P 529.

Title to Property of Intestate

Under this section, title to the property of one who dies intestate passes immediately to the heirs, subject to the control of the district court and to the possession of the administrator for the purposes of administration. *Lamont v. Vinger*, 61 M 530, 537, 202 P 769.

Rights to testator's or intestate's property vest under this section immediately on testator's death. *In re Nossen's Estate*, — M —, 162 P 2d 216, 217.

If a deed from intestate to wife was void the title to the realty, when deed was set aside, passed directly to the heirs upon

his death. *Murch v. Fellows*, — M —, 167 P 2d 842, 843.

Title Vests Immediately Upon Death

Under this section title to real and personal property of an intestate passes by operation of law to, and immediately upon his death vests in, his heirs, subject to the control of the district court for purposes of administration. *Gaines v. Van Demark*, 106 M 1, 8, 74 P 2d 454; *In re Clark's Estate*, 105 M 401, 413, 74 P 2d 401.

References

Cited or applied as section 1851, Civil

Code, in *Hinds v. Wilcox*, 22 M 4, 11, 55 P 355; as section 4819, Revised Codes, in *In re Colbert's Estate*, 44 M 259, 266, 119 P 791; *In re Pomeroy*, 51 M 119, 124, 151 P 333; *Marcellus v. Wright*, 51 M 559, 563, 154 P 714; *In re Connolly's Estate*, 73 M 35, 65, 235 P 408; *In re Bernheim's Estate*, 82 M 198, 215, 266 P 378.

Descent and Distribution 1-19.

26 C.J.S. Descent and Distribution §§ 1-18.

16 Am. Jur. 791, Descent and Distribution, § 24.

91-403. (7073) Succession to and distribution of estates. When any person having title to any estate not limited by marriage contract dies without disposing of the estate by will, it is succeeded to and must be distributed, unless otherwise expressly provided by the laws of Montana, subject to the payment of his debts, in the following manner:

1. If the decedent leaves a surviving husband or wife, and only one (1) child, or the lawful issue of one (1) child, in equal shares to the surviving husband, or wife and child, or issue of such child. If the decedent leaves a surviving husband or wife, and more than one (1) child living, or one (1) child living, and the lawful issue of one (1) or more deceased children, one-third ($\frac{1}{3}$) to the surviving husband or wife, and the remainder in equal shares to his children, and to the lawful issue of any deceased child, by right of representation; but if there be no child of the decedent living at his death, the remainder goes to all his lineal descendants; and if all the descendants are in the same degree of kindred to the decedent, they share equally, otherwise they take according to the right of representation. If the decedent leaves no surviving husband or wife, but leaves issue, the whole estate goes to such issue; and if such issue consists of more than one (1) child living, or one (1) child living, and the lawful issue of one (1) or more deceased children, then the estate goes in equal shares to the children living, or to the child living, and the issue of the deceased child or children by right of representation.

2. If the decedent leaves no issue, the whole of the estate shall go to the surviving husband or wife. If the decedent leaves no issue, nor husband nor wife, the estate must go to the father and mother in equal shares, or if either be dead then to the other.

3. If there be neither issue, husband, wife, father, nor mother, then in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of representation.

4. If the decedent leaves neither issue, husband, wife, father, mother, brother, nor sister, the estate goes to the next of kin, in equal degree, excepting that where there are two (2) or more collateral kindred, in equal degree, but claiming through different ancestors, those who claimed through the nearest ancestors must be preferred to those claiming through an ancestor more remote.

5. If the decedent leaves several children, or one (1) child, and the issue of one (1) or more children, and any such surviving child dies under

age, and not having been married, all the estate that came to the deceased child by inheritance from such decedent descends in equal shares to the other children of the same parent, and to the issue of any such other children who are dead, by right of representation.

6. If, at the death of such child, who dies under age, not having been married, all the other children of his parents are also dead, and any of them have left issue, the estate that came to such child by inheritance from his parent descends to the issue of all other children of the same parent; and if all the issue are in the same degree of kindred to the child, they share the estate equally, otherwise they take according to the right of representation.

7. If the decedent leaves no husband, wife, or kindred, the estate escheats to the state.

History: Ap. p. Sec. 252, p. 361, Cod. Stat. 1871; amd. Sec. 534, p. 364, L. 1877; re-en. Sec. 534, 2nd Div. Rev. Stat. 1879; re-en. Sec. 534, 2nd Div. Comp. Stat. 1887; amd. Sec. 1852, Civ. C. 1895; re-en. Sec. 4820, Rev. C. 1907. Subd. 8: En. Sec. 535, p. 366, L. 1877; amd. Sec. 1, p. 48, L. 1879; re-en. Sec. 535, 2nd Div. Rev. Stat. 1879; re-en. Sec. 535, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1852, Civ. C. 1895; re-en. Sec. 4820, Rev. C. 1907; re-en. Sec. 7073, R. C. M. 1921; amd. Sec. 1, Ch. 140, L. 1941; amd. Sec. 1, Ch. 60, L. 1947. Cal. Civ. C. Sec. 1386.

Cross-Reference

Annulment of marriage, succession of children, sec. 48-204.

Conflicts

The fourth and second subdivisions of this section do not conflict; collating the two subdivisions, there is a plain legislative declaration that, to enable nieces or nephews to share an estate with a surviving wife, there must be a surviving brother or sister and neither father nor mother. *Brundy v. Canby*, 50 M 454, 469, 148 P 315.

Dower and Succession

The district court, when exercising its probate jurisdiction, has no power with reference to dower. In *re Dahlman's Estate*, 28 M 379, 380, 72 P 750.

The right of a wife to dower or election under sections 22-101 and 22-109 are separate from her rights as an heir of her husband. *Dahlman v. Dahlman*, 28 M 373, 377, 72 P 748.

Effect of Void Residuary Clause

Where the residuary clause of a will was void for uncertainty in providing that the residue should be divided among testator's relatives by consanguinity and affinity, there was no testamentary disposition thereof and the residue was distributable according to the law of succession to the

heirs at law. In *re Bernheim's Estate*, 82 M 198, 215, 266 P 378.

Right of Adopted Child

As against collateral heirs, an adopted child, in the absence of a will, succeeds to all the estate of the person adopting. In *re Peppin's Estate*, 53 M 240, 246, 163 P 104.

Sufficiency of Allegation as to Heirs

Since under this section, subdivision 2, the father and mother of an intestate were his heirs at law, the allegation of plaintiff administrator that the adult for whose wrongful death damages were sought died intestate, leaving surviving him his father and mother, naming them, was sufficient to state by inference that they were his heirs, in the absence of a direct allegation to that effect. *Batchoff v. Butte Pacific Copper Co.*, 60 M 179, 185, 198 P 132.

When State May Contest a Will

Where a testator died without heirs, the state was entitled to contest a proposed will, since it was an interested party within the meaning of the code. *State ex rel. Donovan v. District Court*, 25 M 355, 365, 65 P 120. See also *State ex rel. Donovan v. Ledwidge*, 27 M 197, 203, 70 P 511.

References

Cited or applied as section 4820, Revised Codes, in *re Pomeroy*, 51 M 119, 124, 151 P 333; *Marcellus v. Wright*, 51 M 559, 561, 154 P 714; *Mork v. Mellett et al.*, 62 M 477, 481, 205 P 664; *Raistakka v. Fagerstrom et al.*, 64 M 173, 179, 203 P 949; *Hoppin v. Long*, 74 M 558, 582, 241 P 636; *State v. District Court et al.*, 76 M 143, 148, 245 P 529; In *re Springer's Estate*, 79 M 256, 263, 255 P 1058; *Bottomly v. Meagher County*, 114 M 220, 225, 133 P 2d 770; *Miller v. Talbott*, 115 M 1, 21, 139 P 2d 502.

Descent and Distribution—20-67.

26 C.J.S. Descent and Distribution § 19
et seq.

16 Am. Jur. 804, Descent and Distribu-
tion, §§ 36 et seq.

91-404. (7074) Illegitimate children to inherit in certain events. Every illegitimate child is an heir of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child; and in all cases is an heir of his mother; and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock; but he does not represent his father or mother by inheriting any part of the estate of his or her kindred, either lineal or collateral, unless, before his death, his parents shall have intermarried, and his father, after such marriage, acknowledges him as his child, or adopts him into his family, in which case such child and all the legitimate children are considered brother and sisters, and on the death of either of them, intestate, and without issue, the others inherit his estate, and are heirs, as hereinbefore provided, in like manner as if all the children had been legitimate; saving to the father and mother, respectively, their rights in the estates of all the children in like manner as if all had been legitimate. The issue of all marriages null in law, or dissolved by divorce, are legitimate.

History: This Act en. Secs. 536-557, pp. 366-370, L. 1877; re-en. Secs. 536-557, 2nd Div. Rev. Stat. 1879; re-en. Secs. 536-557, 2nd Div. Comp. Stat. 1887.

This section en. Sec. 1853, Civ. C. 1895; re-en. Sec. 4821, Rev. C. 1907; re-en. Sec. 7074, R. C. M. 1921. Cal. Civ. C. Sec. 1387.

Operation and Effect

In a proceeding to determine the right of a foreign resident, born out of wedlock but acknowledged by his father prior to his emigration to the United States, to nominate an administrator of his father's estate in Montana, evidence consisting of a duly authenticated copy of a German court of record showing that decedent there acknowledged him as his son; that during his lifetime and residence in this state he had frequently referred to the boy as his son, had sent him money for his support and expressed his intention to bring him to this country, held sufficient to meet the provision of this section, that every illegitimate child is an heir of the person who in writing acknowledges himself to be its father. In *re Wehr's Estate*, 96 M 245, 250 et seq., 29 P 2d 836.

Id. Under this section, where an illegitimate child is acknowledged by its father as therein provided, such child is placed on the same footing as one born in lawful wedlock, so far as the right of inheritance of his father's estate situated in Montana is concerned, it being of no importance why or in what state or country the acknowledgment was made.

Under this section, a writing executed by the father of an illegitimate child acknowledging its paternity, the execution of which is witnessed by a competent witness, is a sufficient compliance with the statute without regard to the purpose for which the instrument was executed. In *re Adam's Estate*, 97 M 70, 32 P 2d 854.

Bastards—13, 99-102, 105.

10 C.J.S. Bastards §§ 11, 14, 26, 27.

7 Am. Jur. 720, Bastards, §§ 150 et seq.

Inheritance by, from, or through illegitimate. 24 ALR 570 and 83 ALR 1330.

Right of child legitimized by marriage of parents to take by inheritance from kindred of parents. 64 ALR 1124.

91-405. (7075) The mother is a successor to illegitimate child. If an illegitimate child, who has not been acknowledged or adopted by his father, dies intestate, without lawful issue, his estate goes to his mother, or, in case of her decease, to her heirs at law.

History: This Act en. Secs. 536-557, pp. 366-370, L. 1877; re-en. Secs. 536-557, 2nd Div. Rev. Stat. 1879; re-en. Secs. 536-557, 2nd Div. Comp. Stat. 1887.

This section en. Sec. 1854, Civ. C. 1895;

re-en. Sec. 4822, Rev. C. 1907; re-en. Sec. 7075, R. C. M. 1921. Cal. Civ. C. Sec. 1388.

Bastards—104.

10 C.J.S. Bastards § 29.

91-406. (7076) Degrees of kindred—how computed. The degree of kindred is established by the number of generations, and each generation is called a degree.

History: This Act en. Secs. 536-557, pp. 7076, R. C. M. 1921. Cal. Civ. C. Sec. 366-370, L. 1877; re-en. Secs. 536-557, 2nd 1389.
Div. Rev. Stat. 1879; re-en. Secs. 536-557,
2nd Div. Comp. Stat. 1887.

This section en. Sec. 1855, Civ. C. 1895; 16 Am. Jur. 825, Descent and Distribu-
re-en. Sec. 4823, Rev. C. 1907; re-en. Sec. tion, § 55.

91-407. (7077) Same—lineal and collateral consanguinity. The series of degrees forms the line; the series of degrees between persons who descend from one another is called direct or lineal consanguinity; and the series of degrees between persons who do not descend from one another, but spring from a common ancestor, is called the collateral line or collateral consanguinity.

History: This Act en. Secs. 536-557, pp. re-en. Sec. 4824, Rev. C. 1907; re-en. Sec. 366-370, L. 1877; re-en. Secs. 536-557, 2nd 7077, R. C. M. 1921. Cal. Civ. C. Sec. 1390.
Div. Rev. Stat. 1879; re-en. Secs. 536-557,
2nd Div. Comp. Stat. 1887.

Descent and Distribution 20-22.
26 C.J.S. Descent and Distribution §§ 19,
20, 22, 25.

This section en. Sec. 1856, Civ. C. 1895;

91-408. (7078) Same—ascending and descending direct line. The direct line is divided into a direct line descending and a direct line ascending. The first is that which connects the ancestors with those who descend from him. The second is that which connects a person with those from whom he descends.

History: This Act en. Secs. 536-557, pp. This section en. Sec. 1857, Civ. C. 1895;
366-370, L. 1877; re-en. Secs. 536-557, 2nd re-en. Sec. 4825, Rev. C. 1907; re-en. Sec. 7078, R. C. M. 1921. Cal. Civ. C. Sec. 1391.
Div. Rev. Stat. 1879; re-en. Secs. 536-557,
2nd Div. Comp. Stat. 1887.

91-409. (7079) Same—degrees in direct line. In the direct line there are as many degrees as there are generations. Thus, the son is, with regard to the father, in the first degree; the grandson in the second; and vice versa with regard to the father and grandfather toward the sons and grandsons.

History: This Act en. Secs. 536-557, pp. re-en. Sec. 4826, Rev. C. 1907; re-en. Sec. 366-370, L. 1877; re-en. Secs. 536-557, 2nd 7079, R. C. M. 1921. Cal. Civ. C. Sec. 1392.
Div. Rev. Stat. 1879; re-en. Secs. 536-557,
2nd Div. Comp. Stat. 1887.

References

This section en. Sec. 1858, Civ. C. 1895; Raistakka v. Fagerstrom et al., 64 M
173, 179, 208 P 949.

91-410. (7080) Same—degrees in collateral line. In the collateral line, the degrees are counted by generations from one of the relations up to the common ancestor, and from the common ancestor to the other relations. In such computation the decedent is excluded, the relative included, and the ancestor counted but once. Thus, brothers are related in the second degree; uncle and nephew in the third degree; cousins german in the fourth, and so on.

History: This Act en. Secs. 536-557, pp. re-en. Sec. 4827, Rev. C. 1907; re-en. Sec. 366-370, L. 1877; re-en. Secs. 536-557, 2nd 7080, R. C. M. 1921. Cal. Civ. C. Sec. 1393.
Div. Rev. Stat. 1879; re-en. Secs. 536-557,
2nd Div. Comp. Stat. 1887.

References

This section en. Sec. 1859, Civ. C. 1895; Raistakka v. Fagerstrom et al., 64 M
173, 179, 208 P 949.

91-411. (7081) Relatives of the half-blood. Kindred of the half-blood inherit equally with those of the whole-blood in the same degree, unless the inheritance comes to the intestate by descent, devise, or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestors must be excluded from such inheritance.

History: This Act en. Secs. 536-557, pp. 366-370, L. 1877; re-en. Secs. 536-557, 2nd Div. Rev. Stat. 1879; re-en. Secs. 536-557, 2nd Div. Comp. Stat. 1887.

This section en. Sec. 1860, Civ. C. 1895; re-en. Sec. 4828, Rev. C. 1907; re-en. Sec. 7081, R. C. M. 1921. Cal. Civ. C. Sec. 1394.

Descent and Distribution 35.

26 C.J.S. Descent and Distribution § 36.

10 Am. Jur., Descent and Distribution, p. 833, § 62; p. 841, § 68.

Deceased spouse as ancestor of surviving spouse within statute providing that kindred of the half blood inherit equally with those of the whole blood, unless the inheritance come to the intestate by descent, devise, or gift of some one of his ancestors. 110 ALR 1014.

Rights of inheritance in ancestral property as between kindred of whole and half blood. 141 ALR 976.

91-412. (7082) Advancements constitute part of distributive share. Any estate, real or personal, given by the decedent in his lifetime as an advancement to any child, or other lineal descendant, is a part of the estate of the decedent for the purposes of division and distribution thereof among his issue, and must be taken by such child, or other lineal descendant, toward his share of the estate of the decedent.

History: This Act en. Secs. 536-557, pp. 366-370, L. 1877; re-en. Secs. 536-557, 2nd Div. Rev. Stat. 1879; re-en. Secs. 536-557, 2nd Div. Comp. Stat. 1887.

This section en. Sec. 1861, Civ. C. 1895; re-en. Sec. 4829, Rev. C. 1907; re-en. Sec. 7082, R. C. M. 1921. Cal. Civ. C. Sec. 1395.

Cross-Reference

Gifts causa mortis, when treated as legacy, sec. 67-1713.

Descent and Distribution 93-118.

26 C.J.S. Descent and Distribution § 91 et seq.

1 Am. Jur. 711, Advancements.

91-413. (7083) Advancements—when too much or not enough. If the amount of such advancement exceeds the share of the heir receiving the same, he must be excluded from any further portion in the division and distribution of the estate, but he must not be required to refund any part of such advancement; and if the amount so received is less than his share, he is entitled to so much more as will give him his full share of the estate of the decedent.

History: This Act en. Secs. 536-557, pp. 366-370, L. 1877; re-en. Secs. 536-557, 2nd Div. Rev. Stat. 1879; re-en. Secs. 536-557, 2nd Div. Comp. Stat. 1887.

This section en. Sec. 1862, Civ. C. 1895;

re-en. Sec. 4830, Rev. C. 1907; re-en. Sec. 7083, R. C. M. 1921. Cal. Civ. C. Sec. 1396.

Descent and Distribution 106, 106½.

26 C.J.S. Descent and Distribution §§ 62, 93, 105, 108.

91-414. (7084) What are advancements. All gifts and grants are made as advancements, if expressed in the gift or grant to be so made, or if charged in writing by the decedent as an advancement, or acknowledged in writing as such, by the child or other successor or heir.

History: This Act en. Secs. 536-557, pp. 366-370, L. 1877; re-en. Secs. 536-557, 2nd Div. Rev. Stat. 1879; re-en. Secs. 536-557, 2nd Div. Comp. Stat. 1887.

This section en. Sec. 1863, Civ. C. 1895; re-en. Sec. 4831, Rev. C. 1907; re-en. Sec.

7084, R. C. M. 1921. Cal. Civ. C. Sec. 1397.

Descent and Distribution 93-100.

26 C.J.S. Descent and Distribution §§ 91, 92, 94-96, 98, 101-103.

91-415. (7085) Value of advancements—how determined. If the value of the estate so advanced is expressed in the conveyance, or in the charge thereof made by the decedent, or in the acknowledgment of the party receiving it, it must be held as of that value in the division and distribution of the estate; otherwise, it must be estimated according to its value when given, as nearly as the same can be ascertained.

History: This Act en. Secs. 536-557, pp. 366-370, L. 1877; re-en. Secs. 536-557, 2nd Div. Rev. Stat. 1879; re-en. Secs. 536-557, 2nd Div. Comp. Stat. 1887.

This section en. Sec. 1864, Civ. C. 1895; re-en. Sec. 4832, Rev. C. 1907; re-en. Sec. 7085, R. C. M. 1921. Cal. Civ. C. Sec. 1398.

91-416. (7086) When heir, advanced to, dies before decedent. If any child, or other lineal descendant receiving advancement, dies before the decedent, leaving issue, the advancement must be taken into consideration in the division and distribution of the estate, and the amount thereof must be allowed accordingly by the representatives of the heirs receiving the advancement, in the like manner as if the advancement had been made directly to them.

History: This Act en. Secs. 536-557, pp. 366-370, L. 1877; re-en. Secs. 536-557, 2nd Div. Rev. Stat. 1879; re-en. Secs. 536-557, 2nd Div. Comp. Stat. 1887.

This section en. Sec. 1865, Civ. C. 1895;

re-en. Sec. 4833, Rev. C. 1907; re-en. Sec. 7086, R. C. M. 1921. Cal. Civ. C. Sec. 1399.

Descent and Distribution—105.
26 C.J.S. Descent and Distribution §§ 93, 95.

91-417. (7087) Inheritance by representation. Inheritance or succession "by right of representation" takes place when the descendants of any deceased heir take the same share or right in the estate of another person that their parents would have taken if living. Posthumous children are considered as living at the death of their parents.

History: This Act en. Secs. 536-557, pp. 366-370, L. 1877; re-en. Secs. 536-557, 2nd Div. Rev. Stat. 1879; re-en. Secs. 536-557, 2nd Div. Comp. Stat. 1887.

This section en. Sec. 1866, Civ. C. 1895; re-en. Sec. 4834, Rev. C. 1907; re-en. Sec. 7087, R. C. M. 1921. Cal. Civ. C. Sec. 1403.

Operation and Effect

A child unborn at the time of the death

of the father is deemed to have been then living, and therefore enjoys all the rights of inheritance conferred upon a living person. *Haydon v. Normandin*, 55 M 539, 542, 179 P 460.

Descent and Distribution—28, 40.
26 C.J.S. Descent and Distribution §§ 31, 40.

91-418. (7088) Aliens may inherit, when and how. Resident aliens may take in all cases by succession as citizens, and no person capable of succeeding under the laws of Montana governing the succession to property is precluded from such succession by reason of the alienage of any relative.

No nonresident alien shall take money or property by succession except when the provisions of sections 91-519 to 91-523 permit such inheritance by persons residing in a foreign country having reciprocal laws.

Any nonresident alien entitled to claim succession under the provisions of said act, must appear and claim the same within two (2) years after the date on which said property shall have come into the possession of the state treasurer of Montana, saving, however, to infants and persons of unsound mind the right to claim such property within two (2) years after their respective disabilities cease.

All claims authorized by this section shall be asserted in the manner provided by sections 91-501 to 91-514, the Escheated Property Act of Montana, and all the provisions of said act, and amendments thereof, not inconsistent with the provisions of this section are hereby made applicable to the prosecution of claims for succession to property by aliens.

History: This Act en. Secs. 536-557, pp. 366-370, L. 1877; re-en. Secs. 536-557, 2nd Div. Rev. Stat. 1879; re-en. Secs. 536-557, 2nd Div. Comp. Stat. 1887.

This section en. Sec. 1867, Civ. C. 1895; re-en. Sec. 4835, Rev. C. 1907; re-en. Sec. 7088, R. C. M. 1921; amd. Sec. 1, Ch. 44, L. 1947. Cal. Civ. C. Sec. 1404.

Constitutionality

The last clause of this section is a statute of limitations, and not repugnant to that provision of the constitution, found in art. III, sec. 25, which places aliens and denizens on the same footing as citizens in granting the right to inherit. In re Colbert's Estate, 44 M 259, 267, 119 P 791.

Id. Since the legislature, in enacting statutes of limitation, may lawfully discriminate even between citizens of the different states, a nonresident foreigner may not successfully invoke the "privileges and immunities" clause of the federal constitution in support of his contention that this section, making his right to inherit depend upon his claiming succession within five years after the death of the decedent, is unconstitutional.

Effect of Death of Entryman Before Final Proof of Homestead on an Alien

Although under this section, a resident alien may take by succession as a citizen, under section 2291, United States Revised Statutes, patent to homestead land can issue only to citizens of the United States, and therefore the alien mother of an entryman who died intestate before final proof had been made was not entitled to take a one-half interest in the homestead under a patent subsequently issued to the decedent's heirs and devisees. Mork v. Mellett et al., 62 M 477, 481, 205 P 664.

Right of State During Five Year Period

A proceeding by the attorney general to reduce the property to his possession, or a proceeding by him in the nature of an inquest of office to determine whether the state has title by escheat to lands, may not, in any event, be commenced within five years after the death of the decedent. State ex rel. Donovan v. District Court, 25 M 355, 364, 65 P 120.

Id. Where a testator had no resident heirs, the state was entitled to file objections to the probate of the will before the expiration of five years from the death of

the testator. See also State ex rel. Donovan v. Ledwidge, 27 M 197, 203, 70 P 511.

Though proceedings by the attorney general to reduce alleged escheated property to the possession of the state may not, under this section, be commenced within five years after the death of the decedent, the state is possessed of sufficient interest in the estate prior to the institution of such proceedings, to warrant that officer in objecting to the settlement of the administrator's accounts. State v. Kearns, 79 M 299, 312, 257 P 1002.

Special Provisions Relating Only to Aliens

This section and the next two succeeding sections are special and exclusive provisions, and have no application to cases in which citizens of the United States appear as claimants. In re Pomeroy, 33 M 69, 73, 81 P 629.

In granting the right to inherit, the constitution goes no further than to put aliens and denizens on the same footing as citizens. In re Colbert's Estate, 44 M 259, 267, 119 P 791.

When Public Administrator Should be Denied Letters of Administration

The district court properly denied the request of a public administrator for letters of administration, and did not commit error in granting such letters to a resident of the state, whose appointment as administrator had been asked by decedent's nonresident brothers and sisters. In re Watson's Estate, 31 M 438, 440, 78 P 702.

Operation and Effect

This section is only a statute of limitations which does not affect vested right of succession but deals only with remedy by which it is asserted. In re Nossen's Estate, — M —, 162 P 2d 216, 217.

References

Cited or applied in section 4835, Revised Codes, in State ex rel. Kolbow v. District Court, 38 M 415, 417, 100 P 207; Bottomly v. Meagher County, 114 M 220, 225, 229, 133 P 2d 770.

Aliens—9.

3 C.J.S. Aliens § 9.

2 Am. Jur. 480, Aliens, §§ 37 et seq.

Right of alien enemy to take by inheritance or by will. 137 ALR 1328.

91-419 (7089) to 91-421 (7091). Repealed—Chapter 44, laws of 1947.

91-422. (7092) Successor liable for decedent's obligations. Those who succeed to the property of a decedent are liable for his obligations in the cases and to the extent prescribed by this Title.

History: This Act en. Secs. 536-557, pp. 366-370, L. 1877; re-en. Secs. 536-557, 2nd Div. Rev. Stat. 1879; re-en. Secs. 536-557, 2nd Div. Comp. Stat. 1887. This section en. Sec. 1871, Civ. C. 1895; re-en. Sec. 4839, Rev. C. 1907; re-en. Sec. 7092, R. C. M. 1921. Cal. Civ. C. Sec. 1408. Field Civ. C. Sec. 669.

CHAPTER 5

ESCHEATED ESTATES—INHERITANCE BY NONRESIDENT ALIENS— DISPOSAL OF UNCLAIMED PROPERTY

- Section 91-501. Escheated property act.
 91-502. Title to escheated property vests in state—when.
 91-503. Public administrator to deposit moneys of estate with county treasurer—disbursement.
 91-504. Investment and disposal of money and property.
 91-505. Unsold personal property, how disposed of—auction sale.
 91-506. Unsold real property, how disposed of—auction sale.
 91-507. Unclaimed personal property in hands of agent—disposal.
 91-508. Sales by state treasurer, how conducted.
 91-509. Court action by claimant of property in hands of state treasurer—limitation of action—judgment.
 91-510. Money from escheated estates to be placed in public school fund—action to recover.
 91-511. Judgment creditor—procedure for payment.
 91-512. Duty of attorney general—employment of special assistant.
 91-513. Moneys may be invested in state general fund warrants.
 91-514. Repealing clause—exception.
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 91-519. "Person" defined.
 91-520. Receipt of estates by aliens in foreign country—conditions.
 91-521. Duties of executors and administrators.
 91-522. To what estates applicable.
 91-523. Disposition of money.
 91-524. Payments to county treasurer.
 91-525. Claim for money paid into treasury.
 91-526. Deposit of unclaimed property—escheat to state.

91-501. Escheated property act. This act is to be known as the "escheated property act", and it provides the exclusive method for vesting title in the state of Montana of all unclaimed property.

History: En. Sec. 1, Ch. 184, L. 1943.

91-502. Title to escheated property vests in state—when. Whenever the title to any property, either real, personal, or mixed, fails for want of heirs or next of kin, such title shall vest in the state of Montana immediately upon the death of the owner without an inquest or other proceeding in the nature of office found, and there shall be no presumption that such owner died leaving heirs or next of kin.

History: En. Sec. 2, Ch. 184, L. 1943.

91-503. Public administrator to deposit moneys of estate with county treasurer—disbursement. It is the duty of every public administrator, as

soon as he receives the same, to deposit with the county treasurer of the county in which probate proceedings are pending, all moneys of the estate, and such moneys may be drawn upon the order of the public administrator, countersigned by a district judge, when required for the purposes of administration. It is the duty of the county treasurer to receive and safely keep all such moneys, and pay them out upon the order of the public administrator, when countersigned by a district judge, and not otherwise, and to keep an account with such estate of all moneys received and paid to him; and for the safekeeping and payment of all such moneys, as herein provided, the said treasurer and his sureties are liable upon his official bond.

History: En. Sec. 3, Ch. 184, L. 1943.

91-504. Investment and disposal of money and property. The moneys thus deposited may, upon order of the court or judge, be invested, pending the proceedings, in securities of the United States, or of this state, when such investment is for the best interests of the estate. At the final settlement of any estate, if there be no heirs or other claimants thereof, the district judge shall make an order directing the public administrator to sell all property belonging to the estate and pay the proceeds to the county treasurer, who shall keep an account with such estate of all moneys received and paid to him, and the county treasurer shall forthwith remit all of said money to the state treasurer with a statement as to the estates to which the money belongs. And the state treasurer shall thereupon deposit such money so received by him in the public school fund of the state of Montana.

History: En. Sec. 4, Ch. 184, L. 1943.

91-505. Unsold personal property, how disposed of—auction sale. If the personal property in an estate was not sold by the executor or administrator at the final settlement of the estates as by law provided, then it shall be the duty of such executor or administrator to turn over all of such property to the county treasurer, who in turn shall deliver it to the state treasurer with a statement setting forth the name of the estate to which it belongs, and the state treasurer must within one (1) year of the receipt of such property cause the same to be sold to the highest bidder at a public auction sale, at his office in Helena, Montana. The state treasurer shall give notice of such sale by publication in a newspaper published in the city of Helena, Montana, once a week for two (2) successive weeks, making in all two (2) publications, the last publication to be at least twenty (20) days prior to the date of such sale. Such notice shall give the time and place of such sale and shall contain a list and description of the stocks, bonds, securities, effects, or other personal property to be sold. All of the expenses of such sale shall be deducted from the proceeds thereof by the state treasurer and the balance of such proceeds shall be deposited by the state treasurer in the public school fund of the state of Montana.

History: En. Sec. 5, Ch. 184, L. 1943.

91-506. Unsold real property, how disposed of—auction sale. If the real property was not sold by the executor or administrator or public administrator at the final settlement of the estate as by law provided, then it shall be the duty of the executor or administrator or public administrator to make and execute to the state of Montana an executor's or administrator's

deed and to deliver the same to the county clerk and recorder of the county wherein such real property is situated, and it shall then become the duty of the county clerk and recorder to file and record said deed, without charge, and after being so recorded the county clerk and recorder shall mail the said deed to the state board of land commissioners. Within one (1) year after the receipt of such recorded deed the state board of land commissioners shall cause such property to be sold to the highest bidder at public auction sale, to be held at the court house in the county where such real property or any part thereof is situated. The state board of land commissioners shall give notice of such sale by publication in a newspaper published in the county wherein such real estate or any part thereof is situated once a week for two (2) weeks, making in all two (2) publications, the last publication to be at least twenty (20) days prior to the date of such sale. Such notice shall give the time and place of such sale and contain a description of the real property to be sold. All expenses of such sale shall be deducted by the state board of land commissioners from the proceeds thereof and the balance of such proceeds shall be turned over to the state treasurer who shall deposit the same in the public school fund of the state of Montana.

History: En. Sec. 6, Ch. 184, L. 1943.

91-507. Unclaimed personal property in hands of agent — disposal. Whenever the personal property in an estate remains in the hands of an agent, unclaimed for two (2) years and it appears to the court or judge that it is for the best interests of the estate and those interested therein, such property shall be sold under the order of the court or judge and the proceeds, after deducting the expenses of the sale allowed by the court or judge, must be paid into the state treasury, and upon receipt of such proceeds it shall be the duty of the state treasurer to deposit the same in the public school fund of the state of Montana.

History: En. Sec. 7, Ch. 184, L. 1943.

91-508. Sales by state treasurer, how conducted. All hereinbefore mentioned sales by the state treasurer must be at public auction at his office in the state capitol. Said sales must be for cash and shall be made to the highest bidder, provided, however, that the state treasurer may reject all bids which are disproportionate to the value of the property being sold.

History: En. Sec. 8, Ch. 184, L. 1943.

91-509. Court action by claimant of property in hands of state treasurer — limitation of action — judgment. Any persons claiming property in the hands of the state treasurer must bring an action in the district court of Lewis and Clark county, Montana, against the state treasurer. In such action one copy of the complaint and summons must be served upon the state treasurer, one must be served upon the attorney general and one must be served upon the state board of equalization.

Such action shall be prosecuted subject to all of the provisions of the statutes of this state in relation to civil actions generally, including the right of either party to appeal to the supreme court of the state of Montana. Such action must be brought within two (2) years from the date on which the money or property is received by the state treasurer, saving, however, to infants and persons of unsound mind, or citizens of the United States

beyond the limits of the United States, the right to commence their action at any time within the time limited or two (2) years after their respective disabilities cease.

The judgment of the court in such action shall determine and fix the amount of inheritance tax, if any, which is due from said claimant to the state of Montana upon the money or property claimed and none of said money or property shall be turned over to said claimant until said inheritance tax is paid. The state board of equalization shall issue its interlocutory certificate showing the amount of said inheritance tax due, if any, and shall have the right to file objections and be heard upon the final determination of said tax.

History: En. Sec. 9, Ch. 184, L. 1943;
amd. Sec. 1, Ch. 79, L. 1945.

91-510. Money from escheated estates to be placed in public school fund—action to recover. All money or property, which is at the time of the passage and approval of this act, in the hands of the state treasurer, from escheated estates, shall be placed by him in the public school fund of the state of Montana and any person claiming such money or property at any time thereafter shall have two (2) years after the passage and approval of this act in which to file and bring an action for the recovery of the same as hereinabove provided.

History: En. Sec. 10, Ch. 184, L. 1943.

91-511. Judgment creditor—procedure for payment. Whenever by final judgment it is determined that an heir or next of kin is entitled to the money or property of a decedent's estate which is in the hands of the state treasurer, the judgment creditor shall cause a certified copy of such judgment to be filed in the office of the board of examiners of the state of Montana, and it shall then become the duty of the board of examiners to request the next convened legislative assembly to appropriate money out of the public school fund to pay such judgment. When such appropriation has been made it shall be paid by the state auditor and the state treasurer in the usual and customary manner and the endorsement of the judgment creditor on the auditor's warrant shall constitute a receipt in full and a release of the state of Montana for any and all claims by said judgment creditor.

History: En. Sec. 11, Ch. 184, L. 1943.

91-512. Duty of attorney general—employment of special assistant. The attorney general of the state of Montana shall be the legal advisor to the state treasurer in connection with all escheated property matters and it shall be the duty of the attorney general to make investigations and conduct inquiries to determine whether there is property in the state of Montana which should escheat to the state of Montana, and to take all steps necessary to secure such escheat, and for this purpose the attorney general is authorized and empowered to employ a special assistant at a salary not to exceed three thousand dollars (\$3,000.00) per annum.

History: En. Sec. 12, Ch. 184, L. 1943.

91-513. Moneys may be invested in state general fund warrants. All moneys from escheated property in the public school fund of this state may

be invested in the state general fund warrants by the state board of examiners.

History: En. Sec. 13, Ch. 184, L. 1943.

91-514. Repealing clause—exception. That all acts and parts of acts in conflict herewith are hereby repealed, provided, however, that this act shall not repeal nor affect the provisions of section 80-322.

History: En. Sec. 15, Ch. 184, L. 1943.

91-515. (9959) Manner of commencing proceedings relative to escheated estates. When the attorney general is informed that any real estate has escheated to this state, he must file an information in behalf of the state in the district court of the county in which such estate, or any part thereof, is situated, setting forth a description of the estate, the name of the person last seized, the name of the occupant and person claiming such estate, if known, and the facts and circumstances in consequence of which the estate is claimed to have escheated, with an allegation that, by reason thereof, the state of Montana has right by law to such estate. Upon such information a summons must issue to such person, requiring him to appear and answer the information within the time allowed by law in civil actions; and the court must make an order setting forth briefly the contents of the information, and requiring all persons interested in the estate to appear and show cause, if any they have, within forty days from date of the order, why the same should not vest in this state; which order must be published for at least one month from the date thereof, in a newspaper published in the county, if one be published therein, and in case no newspaper is published in the county, in some other newspaper in this state.

History: En. Sec. 2250, C. Civ. Proc. 1895; re-en. Sec. 7356, Rev. C. 1907; re-en. Sec. 9959, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1269.

NOTE.—This and the three following sections are retained in the codes since it is likely that they are applicable to estates not distributed when Ch. 184, L. 1943 (secs. 91-501 to 91-514) became effective.

Operation and Effect

A proceeding by the attorney general to reduce property to his possession, or a proceeding by him in the nature of an inquest of office to determine whether the state has title to lands, may not, in any event, be commenced within five years after the death of the decedent. *State ex rel. Donovan v. District Court*, 25 M 355, 364, 65 P 120.

Id. Where a testator had no resident heirs, the state was entitled to file objec-

tions to the probate of the will before the expiration of five years from the testator's death; otherwise the right to contest would be barred by the provisions of section 91-1107.

References

Cited or applied as section 7356, Revised Codes, in *In re Pomeroy*, 51 M 119, 124, 151 P 333; *State v. Kearns*, 79 M 299, 308, 257 P 1002; *Bottomly v. Meagher County*, 114 M 220, 227, 133 P 2d 770.

Escheat \Leftrightarrow 6.

30 C.J.S. Escheat §§ 5, 7-18.

19 Am. Jur. 380-416, Escheat, §§ 1-55.

Necessity of judicial proceeding to vest title to real property in state by escheat. 23 ALR 1237.

Necessity and sufficiency of notice to support title by escheat to decedent's estate. 48 ALR 1342.

91-516. (9960) Receiver of rents and profits may be appointed. The court or judge, upon the information being filed and upon the application of the attorney general, either before or after answer, upon notice to the party claiming such estate, if known, may, upon sufficient cause therefor being shown, appoint a receiver to take charge and receive the rents and profits of the same until the title to such real estate is finally settled.

History: En. Sec. 2251, C. Civ. Proc. 1895; re-en. Sec. 7357, Rev. C. 1907; re-en. Sec. 9960, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1270.

References

Bottomly v. Meagher County, 114 M 220, 227, 133 P 2d 770.

91-517. (9961) Appearance, pleadings and trial. (1) All persons named in the information may appear and answer, and may traverse or deny the facts stated in the information, and the title of the state to lands and tenements therein mentioned, at any time before the time of answering expires, and any other person claiming an interest in such estate may appear and be made a defendant, and by motion for that purpose in open court within the time allowed for answering; and if no person appears and answers within the time, then judgment must be rendered that the state be seized of the lands and tenements in such information claimed. But if any person appear and deny the title set up by the state, or traverse any material fact set forth in the information, the issue of fact must be tried as issues of facts are tried in civil actions. If, after the issues are tried, it appears from the facts found or admitted that the state has good title to the lands and tenements in the information mentioned, or any part thereof, judgment must be rendered that the state be seized thereof, and recover costs of suit against the defendants.

(2) In any judgment rendered, or that has been heretofore rendered by any court of competent jurisdiction, escheating real property to the state, on motion of the attorney general, the court or judge shall make an order that said real property be sold by the sheriff of the county where the same is situate, at public sale, after giving such notice of the time and place of sale as may be prescribed by the court or judge in said order; that the sheriff shall, within five days after such sale, make a report thereof to the court, and upon the hearing of the said report, the court or judge may examine the said witnesses in relation to the same, and if the proceedings were unfair, or the sum bid disproportionate to the value, and if it appear that a sum exceeding such bid at least ten per cent., exclusive of the expense of a new sale, may be obtained, the court or judge may vacate the sale, and direct another sale to be had, of which notice must be given, and the sale in all respects conducted as if no previous sale had taken place. If an offer of ten per cent. more in amount than that named in the report be made to the court in writing by a responsible person, the court or judge may, in its or his discretion, accept such offer, and confirm the sale to such person, or order a new sale.

(3) If it appears to the court or judge that the sale was legally made, and fairly conducted, and that the sum bid is not disproportionate to the value of the property sold, and that a greater sum than ten per cent., exclusive of the expense of a new sale, cannot be obtained, or if the increased bid above mentioned be made and accepted by the court, the court or judge must make an order confirming the sale, and directing the sheriff, in the name of the state, to execute to purchaser or purchasers a conveyance of said property sold; and said conveyance shall vest in the purchaser or purchasers all the right and title of the state therein, and the sheriff shall, out of the proceeds of such sale, pay the costs of said proceedings incurred on behalf of the state, including the expenses

of making such sale, and also an attorney's fee, if additional counsel was employed in said proceedings, to be fixed by the court or judge, not exceeding ten per cent. on the amount of such sale, and the residue thereof shall be paid by said sheriff into the state treasury.

History: En. Sec. 2252, C. Civ. Proc. 1895; re-en. Sec. 7358, Rev. C. 1907; re-en. Sec. 9961, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1271.

References

Bottomly v. Meagher County, 114 M 220, 227, 133 P 2d 770.

91-518. (9962) Proceedings by persons claiming escheated estates.

Within twenty years after judgment for any proceedings had under this chapter, a person, not a party or privy to such proceedings, may file a petition in the district court of the county in which the seat of government is located, showing his claim or right to the property, or the proceeds thereof. A copy of such petition must be served on the attorney general at least twenty days before the hearing of the petition, who must answer the same; and the court must thereupon try the issue as issues are tried in civil actions, and if it be determined that such person is entitled to the property, or the proceeds thereof, it must order the property, if it has not been sold, to be delivered to him, or, if it has been sold and the proceeds paid into the state treasury, then it must order the auditor to draw his warrant on the treasury for the payment of the same, but without interest or cost to the state, a copy of which order, under the seal of the court, shall be a sufficient voucher for drawing such warrant. All persons who fail to appear and file their petitions within the time limited are forever barred; saving, however, to infants and persons of unsound mind, or persons beyond the limits of the United States, the right to appear and file their petitions at any time within the time limited, or five years after their respective disabilities cease; provided, however, that any person claiming the proceeds of the sale of escheated property, or property alleged to have escheated, which have been paid into the treasury of the state of Montana, at any time before the first day of July, 1895, shall have one year after the passage of this act in which to file his petition for the recovery of such proceeds, as hereinabove provided.

History: En. Sec. 2253, C. Civ. Proc. 1895; re-en. Sec. 7359, Rev. C. 1907; amd. Sec. 1, Ch. 132, L. 1913; re-en. Sec. 9962, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1272.

Operation and Effect

The limitation of twenty years within which to file petition in the district court to determine one's heirship to escheated property is exclusive, and the limitation periods prescribed for ordinary actions have no application to such a proceeding. In re Pomeroy, 33 M 69, 72, 81 P 629.

Id. Formerly, a citizen of the United States, claiming, as heir of the deceased owner, property reduced to possession by the state under the escheat laws contained in the Compiled Statutes of 1887, could obtain no relief save through this section, which was not retroactive; but in 1913 an

act was passed whereby heirs, left without relief by the section, were given a year after the passage of the act within which to file their petitions.

Id. This section is not retrospective within the meaning of that term as used in the constitution.

Id. In so far as this section authorizes a judgment that the auditor draw his warrant in the absence of an appropriation, it is in direct conflict with the constitution and invalid. There appears to be no objection to the statute in so far as it authorizes the petitioner to establish his right to the property as a claim against the state which in equity and good conscience it ought to discharge, leaving to subsequent legislative assemblies to provide by adequate appropriations for such claims as they arise and are adjudicated.

References

State v. Kearns, 79 M 299, 257 P 1002;
Bottomly v. Meagher County, 114 M 220,
227, 133 P 2d 770.

Escheat 8.

30 C.J.S. Escheat § 20.

91-519. "Person" defined. "Person" as used in this act shall mean a corporation, association, copartnership, or any other legal entity, as well as a natural person, and the singular thereof shall include the plural.

History: En. Sec. 1, Ch. 104, L. 1939.

References

In re Nossen's Estate, ___ M ___, 162 P
2d 216, 217.

91-520. Receipt of estates by aliens in foreign country—conditions. No person shall receive money or property, save and except mining property, as provided in section 25, Article III, of the Constitution of the state of Montana, as an heir, devisee and/or legatee of a deceased person leaving an estate or portion thereof in the state of Montana, if such heir, devisee and/or legatee, at the time of the death of said deceased person, is not a citizen of the United States and is a resident of a foreign country at the time of the death of said intestate or testator, unless, reciprocally, the foreign country in question would permit the transfer to an heir, devisee and/or legatee residing in the United States, of property left by a deceased person in said foreign country.

History: En. Sec. 2, Ch. 104, L. 1939.

tomly v. Meagher County, 114 M 220, 231,
133 P 2d 770.

Burden of Proof of Reciprocal Right Is on Foreign Claimant

As for alien heirs, since their rights depend upon the existence of the reciprocal permission required of their country under this section, the burden is clearly upon them to prove its existence. Bot-

References

In re Nielson's Estate, ___ M ___, 165
P 2d 692, 794.

Aliens 10.

3 C.J.S. Aliens §§ 12, 14.

91-521. Duties of executors and administrators. In any estate where money or property would have vested in any person but for the provisions of section 91-520, it shall be the duty of the executor or administrator thereof to set forth the name and residence of such person in his petition for letters and to do likewise in his petition for distribution, in which, also, he shall designate and describe the amount of money and/or property which, but for the provisions of this act, would have passed to said heir, legatee or devisee. Upon the final settlement of said estate upon order of the court it shall be the duty of said executor or administrator to deliver all money and/or property affected by such order of court to the county wherein it is situated, in the case of real property by delivering a certified copy of said order to the clerk and recorder of such county, whose duty it shall be to record the same and, in the case of money and/or other personal property, by delivering the same to the treasurer of said county. All property not theretofore converted into cash shall be sold by the county in the same manner as is property sold for taxes, provided that, in the case of real property the deed of said county shall make reference to the book and page of county records wherein is recorded said order of court transferring said real property to said county.

History: En. Sec. 3, Ch. 104, L. 1939.

Constitutionality

Under art. XI, sec. 2, of the state constitution, declaring that the public school fund shall, inter alia, consist of all estates, or distributive shares thereof, that may escheat to the state, held, that the legislature had no power to provide by this and the following section for a diversion of the proceeds of such estates from the state public school fund to the county general fund, nor by sec. 7090, R. C. M. 1935 (repealed), to direct that they be placed in the general fund of the state, but that the act does not otherwise contravene said constitutional provision. *Bottomly v. Meagher County*, 114 M 220, 225, 230, 133 P 2d 770.

Id. "Escheat" is an attribute of sovereignty and constitutes an obstruction in the course of descent; the legislature has power to provide for escheats solely because it represents the sovereignty of the state and is dealing with the state's rights to the reversion of property not permitted under the statutes to go to heirs, but it may not exercise its power in that behalf contrary to the applicable provisions of the constitution.

Not a Succession Statute—County Not an Heir

Held, as against the contention that this act merely modifies the succession statutes and makes the county an heir in place of disqualified nonresident aliens, that an heir is one entitled under the law to succeed to property by right of relationship or descent, and a county, being a state agency for governmental purposes, cannot have such relationship to a deceased person. *Bottomly v. Meagher County*, 114 M 220, 229, 133 P 2d 770.

What Part of Estate May Be Taken

Held, that both under this section and sec. 7090 R. C. M. 1935 (repealed), if all nonresident alien heirs of a decedent are disqualified from sharing in an escheated estate the entire estate is taken, and if only a part of the heirs are disqualified only their interests are taken, art. XI, sec. 2 of the state constitution speaking of "estates, or distributive shares of estates" which may escheat to the state. *Bottomly v. Meagher County*, 114 M 220, 230, 133 P 2d 770.

Escheat⇒6.

30 C.J.S. Escheat §§ 5, 7-18.

91-522. To what estates applicable. This act shall be in full force and effect from and after its passage and approval and the provisions thereof shall apply to all estates now in the process of probate but not heretofore distributed by order of court.

History: En. Sec. 6, Ch. 104, L. 1939.

Operation and Effect

The provision making the statute applicable to vested interests in estates in probate

ess of probate and undistributed at effective date of statute, is invalid as denying due process of law. In *re Nossen's Estate*, ___ M ___, 162 P 2d 216, 217.

91-523. Disposition of money. All money, including that realized from the sale or sales of property delivered to the county by an executor or administrator, under the provisions of this act shall, immediately upon its receipt by the county treasurer be delivered to the state treasurer and by him deposited in the public school fund of the state of Montana.

History: En. Sec. 4, Ch. 104, L. 1939; amd. Sec. 1, Ch. 18, L. 1947.

Effect before Amendment

The provision of this statute before amendment providing for delivery to county general fund of all property of decedent's estate which would have vested

in his nonresident alien next of kin but for other provisions of the statute was invalid as violating constitutional provision (art. 11, sec. 2) placing in state public school fund all escheated estates and escheated interests in estates. In *re Nielsen's Estate*, ___ M ___, 165 P 2d 792, 794.

91-524. Payments to county treasurer. When property in the hands of an administrator, executor, trustee, or other fiduciary, is assigned or distributed to any heir, legatee, devisee, creditor, beneficiary, or person interested in any estate or trust, who has no agent in this state or who cannot be found, or who refuses to accept the same, or to give a proper voucher therefor; or to a minor or incompetent person who has no legal guardian to receive the same, or person authorized to receipt therefor, and

the same or any part thereof consists of money, the administrator, executor, trustee, or other fiduciary may deposit the money in a special fund in the name of the heir, legatee, devisee, creditor, beneficiary, or person interested, with the county treasurer of the county in which the proceedings are pending, or in which such property is located, who shall give a receipt for the same, and be liable upon his official bond therefor; and said receipt shall be deemed and received by the court, or judge thereof, as a voucher in favor of the executor, administrator, trustee or other fiduciary, with the same force and effect as if executed by such heir, legatee, devisee, creditor, beneficiary or person interested.

History: En. Sec. 1, Ch. 128, L. 1947.

91-525. Claim for money paid into treasury. When any person appears and claims the money paid into the county treasury, the district court of such county must inquire into such claim, and if satisfied of his right thereto, must make an order to that effect, and upon presentation of the order, the treasurer must draw his warrant on the special fund for the amount to which claimant is entitled.

History: En. Sec. 2, Ch. 128, L. 1947.

91-526. Deposit of unclaimed property—escheat to state. All money or other property distributed in the administration of an estate of a decedent, or as the subject of a trust, and heretofore or hereafter deposited with the county treasurer to the credit of the distributee, or beneficiary, and any money remaining on deposit to the credit of an estate after final distribution, must be delivered into the state treasury by the county treasurer upon the expiration of one (1) year from the day of such deposit. Money or other property so deposited in the state treasury, if not claimed by the person or persons entitled thereto, within two (2) years from the date of such deposit, by bringing an action as provided in sections 91-501 to 91-513, known as the “escheated property act”, shall escheat to the state of Montana, and be placed in the public school fund as provided therein.

History: En. Sec. 3, Ch. 128, L. 1947.

CHAPTER 6

PROBATE PROCEEDINGS—PUBLIC ADMINISTRATOR

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| Section | 91-601. Duties of public administrator. |
| | 91-602. Must procure letters of administration—bond and oath. |
| | 91-603. Duty of persons in whose house any stranger dies. |
| | 91-604. Must return inventory and administer estate according to this chapter. |
| | 91-605. When to deliver up estates. |
| | 91-606. Civil officers to notify public administrator of waste. |
| | 91-607. Actions for property of decedents. |
| | 91-608. Order to examine party charged with embezzling estate. |
| | 91-609. Punishment for refusing to attend. |
| | 91-610. Order on public administrator to account. |
| | 91-611. Annual publication of condition of estates. |
| | 91-612. Moneys of estates in hands of public administrator, deposit and payment of—escheated estates fund. |
| | 91-612A. Remittance of unclaimed moneys of estates. |
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| | 91-613. Must not be interested or have interested partner. |
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- 91-615. Proceedings against for failure to pay over money.
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- 91-618. Reports and additional bonds may be required.
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- 91-620. Must keep register.
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- 91-623. Estates less than five hundred dollars.
- 91-624. Summary settlement of such estate.
- 91-625. Reports of property received.
- 91-626. Fixing day for hearing of report.
- 91-627. Order upon hearing of report.
- 91-628. Compensation of public administrator.
- 91-629. Retiring public administrator may close pending estates how.
- 91-630. Must qualify as general administrator in 60 days.
- 91-631. Adjustment of compensation.

91-601. (9990) Duties of public administrator. Every public administrator, duly elected, commissioned and qualified, must take charge of estates of persons dying within his county, as follows:

1. Of estates of decedents for which no administrators are appointed, and which, in consequence thereof, are being wasted, uncared for, or lost;
2. Of estates of decedents who have no known heirs;
3. Of estates ordered into his hands by the court; and
4. Of estates upon which letters of administration have been issued to him by the court.

Provided, however, that it shall be unlawful for any public administrator of any county of the state of Montana, to file any petition for the issuance to him as such public administrator of letters of administration of the estate of any decedent, until at least thirty (30) days have elapsed from the day of the death of any such decedent, unless it is affirmatively shown and made to appear in and by any such petition for letters of administration that there are no known heirs of such decedent, or that all of the known heirs of such decedent reside outside of the state of Montana and that the estate of such decedent consists of property of such a nature that it will be lost, wasted or depreciated in value unless cared for and administered upon at once.

History: En. Sec. 333, p. 326, L. 1877; re-en. Sec. 333, 2nd Div. Rev. Stat. 1879; re-en. Sec. 333, 2nd Div. Comp. Stat. 1887; re-en. Sec. 4510, Pol. C. 1895; re-en. Sec. 3073, Rev. C. 1907; re-en. Sec. 9990, R. C. M. 1921; amd. Sec. 1, Ch. 77, L. 1941. Cal. C. Civ. Proc. Sec. 1726.

NOTE.—The only difference in the territorial statutes referred to is the substitution of the probate court for the district court.

Cross-References

Additional bond, requiring, sec. 91-618.
Bond of public administrators, sec. 6-201.
Penalty for violation of duty, sec. 94-35-166.

Operation and Effect

The district court has jurisdiction to

make an order appointing the public administrator as administrator of an estate, although no petition for his appointment has been filed. State ex rel. Lancaster v. Woody, 20 M 413, 416, 51 P 975.

References

Cited or applied as section 4510, Political Code, in State ex rel. Donovan v. District Court, 25 M 355, 364, 65 P 120; In re Rohkramer's Estate, 113 M 545, 550, 131 P 2d 967.

Executors and Administrators—24.

33 C.J.S. Executors and Administrators § 43; 34 C.J.S. Executors and Administrators §§ 1050-1053.

21 Am. Jur. 828-831, Executors and Administrators, §§ 795-803.

91-602. (9991) Must procure letters of administration—bond and oath.

Whenever a public administrator takes charge of an estate, under order of the court, he must, with all convenient dispatch, procure letters of administration thereon, in like manner and on like proceedings as letters of administration are issued to other persons. His official bond and oath are in lieu of the administrator's bond and oath, but when real estate is ordered to be sold, another bond must be required by the court.

History: En. Sec. 334, p. 326, L. 1877; re-en. Sec. 334, 2nd Div. Rev. Stat. 1879; re-en. Sec. 334, 2nd Div. Comp. Stat. 1887; re-en. Sec. 4511, Pol. C. 1895; re-en. Sec. 3074, Rev. C. 1907; re-en. Sec. 9991, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1727.

Operation and Effect

A public administrator does not become ex officio administrator of any estate, but must procure letters of administration in like manner as any other applicant for letters. *O'Rourke v. Harper*, 35 M 346, 349, 89 P 65.

Id. The sureties on the official bond of a public administrator for his second term

of office are not liable for a conversion of funds of an estate where his letters were issued during his first term of office, although it appears that the conversion occurred during his second term.

A public administrator, by applying for letters of administration, does not acquire a vested right, as against his successor in office, to administer upon the estate or to the fees pertaining thereto. In *re Dewar's Estate*, 10 M 426, 439, 25 P 1026; *State ex rel. Lancaster v. Woody*, 20 M 413, 418, 51 P 975.

21 Am. Jur. 828-831, Executors and Administrators, §§ 795-803.

91-603. (9992) Duty of persons in whose house any stranger dies.

Whenever a stranger, or person without known heirs, dies intestate in the house or premises of another, the possessor of such premises, or any one knowing the facts, must give immediate notice thereof to the public administrator of the county; in default of so doing, he is liable for any damage that may be sustained thereby, to be recovered by the public administrator, or any person interested.

History: En. Sec. 335, p. 326, L. 1877; re-en. Sec. 335, 2nd Div. Rev. Stat. 1879; re-en. Sec. 335, 2nd Div. Comp. Stat. 1887; re-en. Sec. 4512, Pol. C. 1895; re-en. Sec. 3075, Rev. C. 1907; re-en. Sec. 9992, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1728.

Executors and Administrators 24, 24, 426.

33 C.J.S. Executors and Administrators §§ 16, 43, 123, 124, 253, 258, 267, 300; 34 C.J.S. Executors and Administrators §§ 692, 1050-1053.

91-604. (9993) Must return inventory and administer estate according to this chapter. The public administrator must make out and return an inventory of all estates taken into his possession, administer and account for the same according to the provisions of this chapter, subject to the control and directions of the court.

History: En. Sec. 336, p. 326, L. 1877; re-en. Sec. 336, 2nd Div. Rev. Stat. 1879; re-en. Sec. 336, 2nd Div. Comp. Stat. 1887; re-en. Sec. 4513, Pol. C. 1895; re-en. Sec. 3076, Rev. C. 1907; re-en. Sec. 9993, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1729.

Executors and Administrators 24, 63.

33 C.J.S. Executors and Administrators §§ 43, 129; 34 C.J.S. Executors and Administrators §§ 1050-1053.

91-605. (9994) When to deliver up estates. If, at any time, letters testamentary or of administration are regularly granted to any other person on the estate of which the public administrator has charge, he must, under order of the court, account for, pay, and deliver to the executor or administrator thus appointed, all the money, property, papers, and estate of every kind in his possession or under his control.

History: En. Sec. 337, p. 327, L. 1877; re-en. Sec. 337, 2nd Div. Rev. Stat. 1879; re-en. Sec. 337, 2nd Div. Comp. Stat. 1887; re-en. Sec. 4514, Pol. C. 1895; re-en. Sec. 3077, Rev. C. 1907; re-en. Sec. 9994, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1730.

Executors and Administrators \Rightarrow 24, 30, 464.

33 C.J.S. Executors and Administrators §§ 43, 68; 34 C.J.S. Executors and Administrators §§ 830, 831, 1050-1053, 1062.

91-606. (9995) Civil officers to notify public administrator of waste. All civil officers must inform the public administrator of all property known to them, belonging to a decedent, which is liable to loss, injury, or waste, and which, by reason thereof, ought to be in the possession of the public administrator.

History: En. Sec. 338, p. 327, L. 1877; re-en. Sec. 338, 2nd Div. Rev. Stat. 1879; re-en. Sec. 338, 2nd Div. Comp. Stat. 1887;

re-en. Sec. 4515, Pol. C. 1895; re-en. Sec. 3078, Rev. C. 1907; re-en. Sec. 9995, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1731.

91-607. (9996) Actions for property of decedents. The public administrator must institute all actions and prosecutions necessary to recover the property, debts, papers, or other estate of the decedent.

History: En. Sec. 339, p. 327, L. 1877; re-en. Sec. 339, 2nd Div. Rev. Stat. 1879; re-en. Sec. 339, 2nd Div. Comp. Stat. 1887; re-en. Sec. 4516, Pol. C. 1895; re-en. Sec. 3079, Rev. C. 1907; re-en. Sec. 9996, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1732.

Executors and Administrators \Rightarrow 24, 85 (2).

33 C.J.S. Executors and Administrators §§ 43, 154, 160; 34 C.J.S. Executors and Administrators §§ 1040, 1042, 1050-1053.

91-608. (9997) Order to examine party charged with embezzling estate. When the public administrator complains to the district court, or a judge thereof, on oath, that any person has concealed, embezzled, or disposed of, or has in his possession any money, goods, property, or effects, to the possession of which such administrator is entitled in his official capacity, the court or judge may cite such person to appear, and may examine him on oath touching the matter of such complaint.

History: En. Sec. 340, p. 328, L. 1877; re-en. Sec. 340, 2nd Div. Rev. Stat. 1879; re-en. Sec. 340, 2nd Div. Comp. Stat. 1887;

re-en. Sec. 4517, Pol. C. 1895; re-en. Sec. 3080, Rev. C. 1907; re-en. Sec. 9997, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1733.

91-609. (9998) Punishment for refusing to attend. All such interrogatories and answers must be reduced to writing and signed by the party examined, and filed in the court. If the person so cited refuses to appear and submit to such examination, or to answer such interrogatories as may be put to him touching the matter of such complaint, the court or judge may commit him to the county jail, there to remain, in close custody, until he submits to the order of the court or judge.

History: En. Sec. 341, p. 328, L. 1877; re-en. Sec. 341, 2nd Div. Rev. Stat. 1879; re-en. Sec. 341, 2nd Div. Comp. Stat. 1887; re-en. Sec. 4518, Pol. C. 1895; re-en. Sec. 3081, Rev. C. 1907; re-en. Sec. 9998, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1734.

Executors and Administrators \Rightarrow 85 (5, 8).

33 C.J.S. Executors and Administrators §§ 161, 165, 166.

91-610. (9999) Order on public administrator to account. The court or judge may, at any time, order the public administrator to account for and deliver all the money of an estate in his hands to the heirs, or to the executors or administrators regularly appointed.

History: En. Sec. 342, p. 328, L. 1877; re-en. Sec. 342, 2nd Div. Rev. Stat. 1879; re-en. Sec. 342, 2nd Div. Comp. Stat. 1887; re-en. Sec. 4519, Pol. C. 1895; re-en. Sec. 3082, Rev. C. 1907; re-en. Sec. 9999, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1735.

Executors and Administrators⇒468 et seq.

33 C.J.S. Executors and Administrators § 12; 34 C.J.S. Executors and Administrators §§ 837, 838 et seq.

91-611. (10000) Annual publication of condition of estates. The public administrator must, once each year, make to the district court or a judge thereof, under oath, a return of all estates of decedents which have come into his hands, the value of the same:

1. The money which has come into his hands from each estate.
2. What he has done with it.
3. The amount of his fees and expenses incurred.
4. The balance, if any, remaining in his hands.
5. Post a copy of the same in the office of the clerk of the district court of the county.

History: En. Sec. 343, p. 329, L. 1877; re-en. Sec. 343, 2nd Div. Rev. Stat. 1879; re-en. Sec. 343, 2nd Div. Comp. Stat. 1887; re-en. Sec. 4520, Pol. C. 1895; re-en. Sec. 3083, Rev. C. 1907; re-en. Sec. 10000, R. C. M. 1921; amd. Sec. 1, Ch. 116, L. 1939. Cal. C. Civ. Proc. Sec. 1736.

ministrator required by this section is a proper charge against the county, and not against the commissions received by that officer. *Gavigan v. Silver Bow County*, 58 M 58, 41 P 2d 409.

Publication of Semi-Annual Report—Cost Proper Charge Against County

The expense incident to the publication of the semi-annual report of the public ad-

Executors and Administrators⇒24, 458 et seq.

33 C.J.S. Executors and Administrators § 43; 34 C.J.S. Executors and Administrators §§ 828, 837, 1050-1053.

91-612. (10001) Moneys of estates in hands of public administrator, deposit and payment of—escheated estates fund. It is the duty of every public administrator, as soon as he receives the same, to deposit with the county treasurer of the county in which probate proceedings are pending, all moneys of the estate, and such moneys may be drawn upon the order of the executor or administrator, countersigned by a district judge, when required for the purposes of administration. It is the duty of the county treasurer to receive and safely keep all such moneys, and pay them out upon the order of the executor or administrator, when countersigned by a district judge, and not otherwise, and to keep an account with such estate of all moneys received and paid to him; and for the safekeeping and payment of all such moneys, as herein provided, the said treasurer and his sureties are liable upon his official bond. The moneys thus deposited may, upon order of the court or judge, be invested, pending the proceedings, in securities of the United States, or of this state, when such investment is for the best interests of the estate. At the final settlement of any estate, if there be no heirs or other claimants thereof, the district judge shall make an order directing the administrator to sell all property belonging to the estate and pay the proceeds to the county treasurer, who shall credit the same and all other moneys belonging to said estate to the escheated estates fund, and the county treasurer shall forthwith remit all of said money to the state treasurer with a statement as to the estates to which the money belongs.

History: En. Sec. 344, p. 329, L. 1877; re-en. Sec. 344, 2nd Div. Comp. Stat. 1887; re-en. Sec. 344, 2nd Div. Rev. Stat. 1879; re-en. Sec. 4521, Pol. C. 1895; re-en. Sec.

3084, Rev. C. 1907; re-en. Sec. 10001, R. C. M. 1921; amd. Sec. 1, Ch. 119, L. 1929; amd. Sec. 1, Ch. 76, L. 1931. Cal. C. Civ. Proc. Sec. 1737.

Operation and Effect

The mingling of all funds received by a public administrator from different estates in his charge in one general deposit in a bank, contrary to the provisions of this section, constitutes a conversion. Funds so mingled lose their identity, and cannot be said to belong to any particular estate. Raban v. Cascade Bank, 33 M 413, 416, 84 P 72.

References

Cited or applied as section 4521, Political Code, in State ex rel. Donovan v. District Court, 25 M 355, 364, 65 P 120; State v. McGraw, 74 M 152, 162, 240 P 812.

Escheat \S 6 et seq.; Executors and Administrators \S 24, 258 et seq., 288 et seq.

30 C.J.S. Escheat \S 5, 7-18; 33 C.J.S. Executors and Administrators \S 43; 34 C.J.S. Executors and Administrators \S 457, 460 et seq., 482, 498 et seq., 1050-1053.

91-612 A. Remittance of unclaimed moneys of estates. Immediately upon the passage and approval of this act, all county treasurers shall remit to the state treasurer all unclaimed moneys of estates in which the order of final distribution has been issued, together with a detailed statement of the estates to which such moneys belong.

History: En. Sec. 2, Ch. 76, L. 1931.

91-612 B. Duties of the state treasurer. The state treasurer shall credit such money to the escheated estates fund and make proper accounting of the estates to which the same belongs, and, after the same shall have remained in the office of the state treasurer for the period prescribed by law, he shall transfer the same to the common school permanent fund. The provisions of this act shall not in any way affect the provisions of sections 5668.19 to 5668.34.

History: En. Sec. 3, Ch. 76, L. 1931.

91-613. (10002) Must not be interested or have interested partner. The public administrator must not be interested in the expenditures of any kind made on account of any estate he administers; nor must he be associated, in business or otherwise, with any one who is so interested; and he must attach to his report and publication, made in accordance with the preceding section, his affidavit to that effect.

History: En. Sec. 345, p. 329, L. 1877; re-en. Sec. 345, 2nd Div. Rev. Stat. 1879; re-en. Sec. 345, 2nd Div. Comp. Stat. 1887; re-en. Sec. 4522, Pol. C. 1895; re-en. Sec. 3085, Rev. C. 1907; re-en. Sec. 10002, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1738.

Executors and Administrators \S 24, 115, 502.

33 C.J.S. Executors and Administrators \S 43, 239-241; 34 C.J.S. Executors and Administrators \S 882, 1050-1053.

91-614. (10003) When to settle with clerk of district court. The public administrator is required to account, under oath, and to settle and adjust his accounts, relating to the care and disbursement of money or property belonging to estates in his hands, with the clerk of the district court, on the first Monday of each month, and he must pay to the county treasurer any money remaining in his hands of an estate unclaimed, as provided in sections 91-4103 to 91-4106.

History: En. Sec. 346, p. 329, L. 1877; re-en. Sec. 346, 2nd Div. Rev. Stat. 1879; re-en. Sec. 346, 2nd Div. Comp. Stat. 1887; re-en. Sec. 4523, Pol. C. 1895; re-en. Sec. 3086, Rev. C. 1907; re-en. Sec. 10003, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1739.

91-615. (10004) Proceedings against for failure to pay over money. When it appears, from the returns made in pursuance of the foregoing sec-

tions, that any money remains in the hands of the public administrator after final settlement of the estate unclaimed, which should be paid over to the county treasurer; the court or judge must order the same paid over to the county treasurer; and on failure of the public administrator to comply with the order within ten days after the same is made, the county attorney must immediately institute the requisite proceedings against the public administrator for a judgment against him and the sureties on his official bond, in the amount of the money so withheld, and costs.

History: En. Sec. 347, p. 330, L. 1877; Executors and Administrators⇒472.
 re-en. Sec. 347, 2nd Div. Rev. Stat. 1879; 34 C.J.S. Executors and Administrators
 re-en. Sec. 347, 2nd Div. Comp. Stat. 1887; §§ 837, 844, 848.
 re-en. Sec. 4524, Pol. C. 1895; re-en. Sec. 3087, Rev. C. 1907; re-en. Sec. 10004, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1740.

91-616. (10005) Fees—how paid. The fees of all officers chargeable to estates in the hands of public administrators must be paid out of the assets thereof, as soon as the same come into his hands.

History: En. Sec. 348, p. 330, L. 1877; **Cross-Reference**
 re-en. Sec. 348, 2nd Div. Rev. Stat. 1879; Fees for own use, secs. 25-202, 25-237.
 re-en. Sec. 348, 2nd Div. Comp. Stat. 1887; Executors and Administrators⇒258.
 re-en. Sec. 4525, Pol. C. 1895; re-en. Sec. 3088, Rev. C. 1907; re-en. Sec. 10005, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1741. §§ 457, 460.

91-617. (10006) May administer oaths. Public administrators may administer oaths in regard to all matters touching the discharge of their duties, or the administration of estates in their hands.

History: En. Sec. 349, p. 330, L. 1877; re-en. Sec. 4526, Pol. C. 1895; re-en. Sec. 3089, Rev. C. 1907; re-en. Sec. 10006, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1742.

91-618. (10007) Reports and additional bonds may be required. The court or judge may, at any time, require the public administrator to report the amount of moneys and property of any estate in his hands, and may require him at any time to file additional bond or bonds.

History: En. as part of this Act, Sec. 33 C.J. S. Executors and Administrators
 4527, Pol. C. 1895; re-en. Sec. 3090, Rev. §§ 43, 67; 34 C.J.S. Executors and Ad-
 C. 1907; re-en. Sec. 10007, R. C. M. 1921. ministrators §§ 828, 837, 1022, 1033, 1037, 1050-1053.

Executors and Administrators⇒24, 26
 (2), 458 et seq.

91-619. (10008) Provisions in code applicable. When no direction is given in this chapter for the government or guidance of a public administrator in the discharge of his duties, or for the administration of an estate in his hands, the provisions of this Title must govern.

History: En. Sec. 350, p. 330, L. 1877; **Operation and Effect**
 re-en. Sec. 350, 2nd Div. Rev. Stat. 1879; A public administrator has the same
 re-en. Sec. 350, 2nd Div. Comp. Stat. 1887; power to compromise claims as an admin-
 re-en. Sec. 4528, Pol. C. 1895; re-en. Sec. 3091, Rev. C. 1907; re-en. Sec. 10008, R. Life Ins. Co., 19 M 95, 103, 47 P 650.
 C. M. 1921. Cal. C. Civ. Proc. Sec. 1743.

91-620. (10009) Must keep register. It is the duty of the public administrator to keep a book, to be labeled "Register of Public Administrator," in which he must enter the name of every deceased person on whose

estate he administers, the date of granting letters, money received, the property and its value, proceeds of all sales of property, the amount of his fees, the expenses of administration, the amount of the estate after all charges and expenses have been paid, the disposition of the property on distribution, the date of discharge of administrator, and such other matters as may be necessary to give a full and complete history of each estate administered by him.

History: En. Sec. 4529, Pol. C. 1895;
re-en. Sec. 3092, Rev. C. 1907; re-en. Sec.
10009, R. C. M. 1921.

91-621. (10010) Statements concerning property of decedent. Whenever any person dies in any county of this state, and no administrator has been appointed to take charge of his estate, the public administrator of such county, prior to the issuance of letters of administration to him, shall have authority to make a written demand upon any person, firm, bank, or corporation, which he believes holds or has in their possession or control any money, evidence of indebtedness, or other personal property, or which owes to such deceased person any money, to furnish to him a written statement, under oath, showing the amount of money, or the evidence of indebtedness, or personal property of such deceased person held by them, fully describing the same, and the total sums of money, if any, due from them to such deceased person. Upon receipt of such written demand, the person, firm, bank, or corporation receiving the same shall immediately furnish, under oath, to such public administrator said statement.

History: En. Sec. 1, Ch. 134, L. 1909; Executors and Administrator \S 85.
re-en. Sec. 10010, R. C. M. 1921. 33 C.J.S. Executors and Administrators
§ 153 et seq.

91-622. (10011) Refusal to furnish statement a misdemeanor. Any person, firm, bank, or corporation, or officer, agent, or employee thereof, refusing upon demand, to furnish the statement, as required by the preceding section, shall be guilty of a misdemeanor.

History: En. Sec. 2, Ch. 134, L. 1909;
re-en. Sec. 10011, R. C. M. 1921.

91-623. (10012) Estates less than five hundred dollars. If the statement or statements furnished the public administrator in accordance with the provisions of section 91-621 show that the aggregate market value of the estate of such deceased person is five hundred dollars (\$500.00) or less in value, then, upon demand of the public administrator, the person, firm, bank, or corporation holding, controlling, or owning the same, or any part thereof, shall turn over, indorse, or surrender the same to such public administrator at once, without the issuance of letters of administration to him. The public administrator shall, upon receipt of the money, evidence of indebtedness, or other personal property, issue a receipt to the person, firm, bank, or corporation delivering the same to him fully describing the property received. Such receipt, signed by the public administrator, shall fully discharge the person, firm, bank, or corporation receiving the same from all further liability to the estate of said deceased person, to the amount of money or for the property set out in said receipt.

History: En. Sec. 3, Ch. 134, L. 1909; re-en. Sec. 10012, R. C. M. 1921; amd. Sec. 1, Ch. 36, L. 1929.

pensing with probate court proceedings, sec. 53-109.

Cross-Reference

Motor vehicles, transfer of title, dis-

Executors and Administrators 7, 85, 86.

33 C.J.S. Executors and Administrators § 11; 34 C.J.S. Executors and Administrators §§ 1056-1061.

91-624. (10013) Summary settlement of such estate. Upon the receipt of money, evidence of indebtedness, or other property, as provided in this act, the public administrator shall proceed at once to the settlement of the estate of the decedent, in the same manner, and shall have the same power and authority, as in estates where letters of administration have been issued to him; provided, that upon ten days' notice, by posting in three public places in the county, he may sell at public auction the personal property received by him, without procuring an order of court authorizing such sale, and that upon the presentation of claims against the estate, duly itemized and verified by the claimant, the public administrator, upon approval thereof, may pay the same without having the approval of the court.

History: En. Sec. 4, Ch. 134, L. 1909; re-en. Sec. 10013, R. C. M. 1921.

91-625. (10014) Reports of property received. Upon the settlement of the estate, the public administrator must, within thirty days, make a full report, under oath, showing all money and property received by him, from whom received, and all disbursements made, and the purposes thereof, and file the same in the office of the clerk of the district court of his county.

History: En. Sec. 5, Ch. 134, L. 1909; re-en. Sec. 10014, R. C. M. 1921.

91-626. (10015) Fixing day for hearing of report. Upon the filing of such report, the clerk of the court must make an order fixing a day for the hearing of the report, giving notice thereof by the posting of notices in three public places in the county for a period of ten days before the date of hearing, at which hearing any and all persons interested therein may appear and object to such report, or to any of the matters contained therein.

History: En. Sec. 6, Ch. 134, L. 1909; re-en. Sec. 10015, R. C. M. 1921.

91-627. (10016) Order upon hearing of report. Upon such hearing, the court may make such orders with reference to such report as may be necessary and proper.

History: En. Sec. 7, Ch. 134, L. 1909; re-en. Sec. 10016, R. C. M. 1921.

91-628. (10017) Compensation of public administrator. The public administrator shall receive as full compensation for his services, including attorney's fees, a commission of fifteen per cent. of the total amount of money received by him in any estate provided for in this act; provided, that in no case shall the compensation be less than five dollars.

History: En. Sec. 8, Ch. 134, L. 1909; re-en. Sec. 10017, R. C. M. 1921.

91-629. Retiring public administrator may close pending estates how. The public administrator, upon the expiration or termination of his term of office, may continue to administer estates not closed by filing and presenting to the court, a full and complete account pertaining to each estate not closed, securing an order of court granting him letters of general administration and qualifying himself as a general administrator under and pursuant to sections 91-1701 and 91-1702, and executing and filing a new bond in such sum or sums as may be fixed by the court.

History: En. Sec. 1, Ch. 4, L. 1941.

91-630. Must qualify as general administrator in 60 days. Should said public administrator, upon the expiration or termination of his said office, and within sixty (60) days thereafter, fail to qualify as general administrator of estates not yet closed, he shall, upon demand of his successor to such office, or voluntarily if he desires to be relieved from further performance of the trust, surrender to said successor all estates not closed and property belonging to such estates, having first filed and presented to the court for approval, a full and complete account pertaining to such estate not closed.

History: En. Sec. 2, Ch. 4, L. 1941.

91-631. Adjustment of compensation. Thereupon the court shall determine and allow such predecessor in office, for his services rendered in connection with estates not closed, a compensation based upon the commission now prescribed and allowed by law, in proportion to the services necessarily rendered and those necessary to be rendered by such successor in closing up such estates. Such successor shall thereupon be allowed and paid the balance of such commission allowed by said section.

History: En. Sec. 3, Ch. 4, L. 1941.

CHAPTER 7

PROBATE PROCEEDINGS—GENERAL JURISDICTION OF DISTRICT COURT

Section 91-701. Jurisdiction of the court over the estate—when exercised.

91-702. When jurisdiction decided by first application.

91-701. (10018) Jurisdiction of the court over the estate—when exercised. Wills must be proved, and letters testamentary or of administration granted:

1. In the county in which the decedent was a resident at the time of his death, in whatever place he may have died.

2. In the county in which the decedent may have died, leaving estate therein, he not being a resident of the state.

3. In the county in which any part of the estate may be, the decedent having died out of the state, and not resident thereof at the time of his death.

4. In the county in which any part of the estate may be, the decedent not being a resident of the state, and not leaving estate in the county in which he died.

5. In all other cases, in the county where application for letters is first made.

History: En. Sec. 6, p. 241, L. 1877; re-en. Sec. 6, 2nd Div. Rev. Stat. 1879; re-en. Sec. 2310, C. Civ. Proc. 1895; re-en. Sec. 7383, Rev. C. 1907; re-en. Sec. 10018, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1294.

NOTE.—In these and all the succeeding sections of the probate practice act the codes of 1895 substituted the words “district court” for the words “probate court” throughout.

General Powers of a Probate Court

A district court sitting in probate has only the special and limited powers conferred by statute, and has no power to hear and determine any matters other than those which come within the purview of the statute, or which are implied as necessary to a complete exercise of those expressly conferred. *Chadwick v. Chadwick*, 6 M 566, 579, 13 P 385; *In re Higgins’ Estate*, 15 M 474, 502, 39 P 506; *State ex rel. Bartlett v. District Court*, 18 M 481, 484, 46 P 259; *Burns v. Smith*, 21 M 251, 266, 53 P 742; *State ex rel. Shields v. District Court*, 24 M 1, 13, 60 P 489; *State ex rel. Kelly v. District Court*, 25 M 33, 38, 63 P 717; *In re Davis’ Estate*, 27 M 490, 495, 71 P 757; *Davidson v. Wampler*, 29 M 61, 67, 74 P 77; *Bullerdick v. Hersmeyer*, 32 M 541, 551, 81 P 334; *In re Tuohy’s Estate*, 33 M 230, 244, 83 P 486; *State ex rel. King v. District Court*, 42 M 182, 184, 111 P 717; *In re Dolenty’s Estate*, 53 M 33, 43, 161 P 524.

Operation and Effect

Where a special administrator is appointed in the county in which the de-

cedent died, and the public administrator in another county is appointed in violation of statute, so that the special administrator is put to the necessity of defending a suit for his removal, the estate should be charged with his expenses. *In re Williams’ Estate*, 55 M 63, 72, 173 P 790.

Will Made by Resident of Montana in Another State

A will made in another state by a resident of Montana is subject to probate under subdivision 1 of this section, relating to domestic wills, though proved and allowed in the foreign state, and not under sections 91-1001 to 91-1003, providing the manner in which a foreign will upon the production of a duly authenticated copy thereof and its probate in another state may be admitted to probate in this state. *In re Mauldin’s Estate*, 69 M 132, 135, 220 P 1102.

References

Cited or applied as section 7383, Revised Codes, in *State ex rel. Mannix v. District Court*, 51 M 310, 315, 152 P 753; *State ex rel. Stimatz v. District Court*, 105 M 510, 515, 74 P 2d 8; *State ex rel. Haynes v. District Court*, 106 M 578, 585, 81 P 2d 422.

Executors and Administrators—8 et seq.; Wills—248-253, 258.

33 C.J.S. Executors and Administrators § 13 et seq.; 68 C.J. Wills § 685 et seq.

57 Am. Jur., Wills, §§ 764 et seq.

91-702. (10019) When jurisdiction decided by first application. When the estate of the decedent is in more than one county, he having died out of the state, and not having been a resident thereof at the time of his death, or being such nonresident, and dying within the state, and not leaving estate in the county where he died, the district court of that county in which the application is first made, for letters testamentary or of administration, has exclusive jurisdiction of the settlement of the estate.

History: En. Sec. 7, p. 241, L. 1877; re-en. Sec. 7, 2nd Div. Rev. Stat. 1879; re-en. Sec. 2311, C. Civ. Proc. 1895; re-en. Sec. 7384, Rev. C. 1907; re-en. Sec. 10019, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1295.

References

In re Mauldin’s Estate, 69 M 132, 135, 220 P 1102.

CHAPTER 8

PROBATE PROCEEDINGS—PROBATE OF WILLS

- Section 91-801. Custodian of will to deliver same, to whom—penalty.
 91-802. Who may petition for probate of will.
 91-803. Contents of petition.
 91-804. When executor forfeits right to letters.
 91-805. Possession of will by third person—production of.

- 91-806. Notice of petition for probate—how given.
- 91-807. Heirs and named executors to be notified, how.
- 91-808. Petition may be presented to judge at chambers, and what judge may do.
- 91-809. Hearing proof of will after proof of service of notice.
- 91-810. Who may appear and contest the will.
- 91-811. Proof required when no contest.
- 91-812. Holographic wills.

91-801. (10020) Custodian of will to deliver same, to whom—penalty.

Every custodian of a will, within thirty days after receipt of information that the maker thereof is dead, must deliver the same to the district court having jurisdiction of the estate, or to the executor named therein. A failure to comply with the provisions of this section makes the person failing responsible for all damages sustained by any one injured thereby.

History: En. Sec. 8, p. 242, L. 1877; re-en. Sec. 8, 2nd Div. Rev. Stat. 1879; re-en. Sec. 8, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2320, C. Civ. Proc. 1895; re-en. Sec. 7385, Rev. C. 1907; re-en. Sec. 10020, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1298.

Operation and Effect

Under the provisions of sections 91-801 to 91-1207 inclusive, giving the district court, while exercising probate jurisdiction, power to entertain a contest of a will, the court has power, on consent of all the parties interested, to enter a decree affirming a compromise of such a contest, and ascertaining the share to which the parties

are respectively entitled. In re Davis' Estate, 27 M 490, 496, 71 P 757. See also State ex rel. Pauwelyn v. District Court, 34 M 345, 348, 86 P 268.

References

Cited or applied as section 2320, Code of Civil Procedure, in Raleigh v. District Court, 24 M 306, 311, 61 P 129; In re Mauldin's Estate, 69 M 132, 136, 220 P 1102.

Wills—129, 211, 746.

68 C.J. Wills §§ 395, 603 et seq.; 69 C.J. Wills § 2700.

57 Am. Jur., Wills, §§ 757 et seq.

91-802. (10021) Who may petition for probate of will. Any executor, devisee, or legatee named in any will, or any other person interested in the estate, may, at any time after the death of the testator, petition the court having jurisdiction to have the will proved, whether the same be in writing, in his possession or not, or is lost or destroyed, or beyond the jurisdiction of the state, or a nuncupative will.

History: En. Sec. 9, p. 242, L. 1877; re-en. Sec. 9, 2nd Div. Rev. Stat. 1879; re-en. Sec. 9, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2321, C. Civ. Proc. 1895; re-en. Sec. 7386, Rev. C. 1907; re-en. Sec. 10021, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1299.

Operation and Effect

The statute leaves the question open for the propounding of a will at any time, and the admission of a will to probate, ipso facto, supersedes and vacates the grant of letters of general administration. In re Davis-Cummings' Appeal, 11 M 196, 213, 28 P 645.

Where an executor, also named as a beneficiary in a will, entered into an agreement with the sister of testatrix, another beneficiary, whereby in consideration of \$1,000 he sold and assigned to the latter all his rights under the will and renounced his right to act as executor, such renun-

ciation was invalid; hence, the renunciation being void, he, under this section, was a proper person to propound the will for probate, as against the contention that, no longer having any interest in the will, he had no legal right to offer it for probate. In re Cummings' Estate, 89 M 405, 413, 298 P 350.

Id. It has been held that even though a person named as executor in a will has renounced the right to serve as such, he is still entitled to propound the will for probate.

Wills—219, 263.

68 C.J. Wills §§ 618 et seq., 703.

21 Am. Jur. 497, Executors and Administrators, § 225.

Right to probate of will as affected by prior appointment of administrator. 95 ALR 1107.

91-803. (10022) Contents of petition. A petition for the probate of a will must show:

1. The jurisdictional facts;
 2. Whether the person named as executor consents to act, or renounces his right to letters testamentary;
 3. The names, ages, and residences of the heirs and devisees of the decedent, so far as known to the petitioner;
 4. The probable value and character of the property of the estate;
 5. The name of the person for whom letters testamentary are prayed.
- No defect of form, or in the statement of jurisdictional facts actually existing, shall make void the probate of a will.

History: En. Sec. 10, p. 242, L. 1877;
 re-en. Sec. 10, 2nd Div. Rev. Stat. 1879;
 re-en. Sec. 10, 2nd Div. Comp. Stat. 1887;
 re-en. Sec. 2322, C. Civ. Proc. 1895; re-en.
 Sec. 7387, Rev. C. 1907; re-en. Sec. 10022,
 R. C. M. 1921. Cal. C. Civ. Proc. Sec.
 1300.

References
 In re Baxter's Estate, 98 M 291, 39 P
 2d 186.

Wills 274-276.
 63 C.J. Wills § 725 et seq.

91-804. (10023) When executor forfeits right to letters. If the person named in a will as executor, for thirty days after he has knowledge of the death of the testator, and that he is named as executor, fails to petition to the proper court for the probate of the will, and that letters testamentary be issued to him, he may be held to have renounced his right to letters, and the court or judge may appoint any other competent person administrator, unless good cause for delay is shown.

History: En. Sec. 11, p. 242, L. 1877;
 re-en. Sec. 11, 2nd Div. Rev. Stat. 1879;
 re-en. Sec. 11, 2nd Div. Comp. Stat. 1887;
 re-en. Sec. 2323, C. Civ. Proc. 1895; re-en.
 Sec. 7388, Rev. C. 1907; re-en. Sec. 10023,
 R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1301.

Executors and Administrators 16.
 33 C.J.S. Executors and Administrators
 § 29.

91-805. (10024) Possession of will by third person—production of. If it is alleged in any petition that any will is in the possession of a third person, and the court or judge is satisfied that the allegation is correct, an order must be issued and served upon the person having possession of the will, requiring him to produce it at a time named in the order. If he has possession of the will, or neglects or refuses to produce it in obedience to the order, he may, by warrant from the court or judge, be committed to the jail of the county, and be kept in close confinement until he produces it.

History: En. Sec. 12, p. 243, L. 1877;
 re-en. Sec. 12, 2nd Div. Rev. Stat. 1879;
 re-en. Sec. 12, 2nd Div. Comp. Stat. 1887;
 re-en. Sec. 2324, C. Civ. Proc. 1895; re-en.

Sec. 7389, Rev. C. 1907; re-en. Sec. 10024,
 R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1302.

Wills 129, 211.
 63 C.J. Wills §§ 395, 603.

91-806. (10025) Notice of petition for probate—how given. When the petition is filed and the will produced, the clerk of the court must set the petition for hearing by the court or judge upon some day not less than ten nor more than thirty days from the production of the will. Notice of hearing shall be given by such clerk by publishing the same in a newspaper in the county; if there is none, then by three written or printed notices, posted at three of the most public places in the county. If the notice is published in a weekly paper, it must appear therein on at least three

different days of publication; and if in a newspaper published oftener than once a week, it shall be published on at least three different days of publication, and it shall be so published that there must be at least ten days from the first to the last day of publication, both the first and last day being included. If the notice is by posting, it must be given at least ten days before the hearing.

History: En. Sec. 13, p. 243, L. 1877; re-en. Sec. 13, 2nd Div. Rev. Stat. 1879; re-en. Sec. 13, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2325, C. Civ. Proc. 1895; re-en. Sec. 7390, Rev. C. 1907; re-en. Sec. 10025, R. C. M. 1921; amd. Sec. 1, Ch. 86, L. 1935. Cal. C. Civ. Proc. Sec. 1303.

NOTE.—See in connection with this section, section 91-4302.

Operation and Effect

Under a statute requiring that notice of the hearing of a petition for the probate of a will shall be published at least three times, upon three different days of publication, when published in a weekly news-

paper, and one similar in its provisions to those contained in section 91-809, providing that at the time of hearing the court must require proof of the will, the court has no jurisdiction until these requirements are complied with; and where the notice of hearing is published only twice, in a weekly paper, an order admitting a will to probate and appointing an administrator with the will annexed is void. In re Estate of Charlebois, 6 M 373, 376, 12 P 775.

Wills—269.

68 C.J. Wills § 711 et seq.

57 Am. Jur., Wills, §§ 836 et seq.

91-807. (10026) Heirs and named executors to be notified, how. Copies of the notice of the time appointed for the probate of the will must be addressed to the heirs of the testator resident in the state, at their places of residence, if known to the petitioner, and deposited in the postoffice, with the postage thereon prepaid, at least ten days before the hearing. If their places of residence be not known, the copies of notice may be addressed to them, and deposited in the postoffice at the county seat of the county where the proceedings are pending. A copy of the same notice must in like manner be mailed to the person named as executor, if he be not the petitioner; also, to any person named as coexecutor not petitioning, if their places of residence be known. Proof of mailing the copies of the notice must be made at the hearing. Personal service of copies of the notice at least ten days before the day of hearing is equivalent to mailing.

History: En. Sec. 14, p. 243, L. 1877; re-en. Sec. 14, 2nd Div. Rev. Stat. 1879; re-en. Sec. 14, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2326, C. Civ. Proc. 1895; re-en. Sec. 7391, Rev. C. 1907; re-en. Sec. 10026, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1304.

References

Montgomery v. Gilbert, 77 F 2d 39.

Wills—269.

68 C.J. Wills, § 711 et seq.

57 Am. Jur., Wills, §§ 836 et seq.

91-808. (10027) Petition may be presented to judge at chambers, and what judge may do. A judge of the district court may, at any time, in court and at chambers, receive petitions for the probate of wills, and make and issue all necessary orders and writs to enforce the production of wills, and the attendance of witnesses, and may appoint special sessions of his court for hearing petitions, trials of issue, and admitting wills to probate.

History: En. Sec. 15, p. 243, L. 1877; re-en. Sec. 15, 2nd Div. Rev. Stat. 1879; re-en. Sec. 15, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2327, C. Civ. Proc. 1895; re-en. Sec. 7392, Rev. C. 1907; re-en. Sec. 10027, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1305.

Presumption Against Intestacy—Liberal Construction

The presumption is against intestacy, and it is the policy of courts to sustain a will if it is possible to do so, every reasonable presumption being indulged in fa-

vor of its execution, and while the statutory requirements with relation to its execution must be clearly and fully observed, the provisions of the statute and all proceedings thereunder, must under sec. 12-202 be liberally construed to effect its objects and promote justice. In re Bragg's Estate, 106 M 132, 140, 76 P 2d 57.

Probate Proceeding of Equitable Nature

A proceeding for the probate of a will

is a special statutory proceeding, equitable in its nature and, on appeal, is governed by the rules applicable in a suit in equity. In re Bragg's Estate, 106 M 132, 140, 76 P 2d 57.

Wills—248, 312 et seq.

68 C.J. Wills §§ 685, 863 et seq.

91-809. (10028) Hearing proof of will after proof of service of notice.

At the time appointed for the hearing, or the time to which the hearing may have been postponed, the court or judge, unless the parties appear, must require proof that the notice has been given, which being made, the court or judge must hear testimony and proof of will.

History: En. Sec. 16, p. 244, L. 1877; re-en. Sec. 16, 2nd Div. Rev. Stat. 1879; re-en. Sec. 16, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2328, C. Civ. Proc. 1895; re-en. Sec. 7393, Rev. C. 1907; re-en. Sec. 10028, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1306.

References

In re Silver's Estate, 98 M 141, 38 P 2d 277; Minter v. Minter, 103 M 219, 230, 62 P 2d 283.

Wills—312 et seq.

68 C.J. Wills § 863 et seq.

91-810. (10029) Who may appear and contest the will. Any person interested may appear and contest the will. Devisees, legatees, or heirs of an estate may contest the will through their guardians, or attorneys appointed by themselves or by the court or judge for that purpose; but a contest made by an attorney appointed by the court or judge does not bar a contest after probate by the party so represented, if commenced within the time provided in sections 91-1101 to 91-1107; nor does the nonappointment of an attorney by the court or judge of itself invalidate the probate of a will.

History: En. Sec. 17, p. 244, L. 1877; re-en. Sec. 17, 2nd Div. Rev. Stat. 1879; re-en. Sec. 17, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2329, C. Civ. Proc. 1895; re-en. Sec. 7394, Rev. C. 1907; re-en. Sec. 10029, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1307.

of Civil Procedure, in State ex rel. Donovan v. District Court, 25 M 355, 364, 65 P 120; In re Hobbins' Estate, 41 M 3, 50, 108 P 7.

Operation and Effect

The public administrator has not any interest in an estate which entitles him to object to the probate of a will. State ex rel. Eakins v. District Court, 34 M 226, 229, 85 P 1022.

Under this section, an heir at law may contest a will through an attorney appointed by him, and the complaint need not allege that the one representing him is his attorney, it being presumed that an attorney at law who represents a client does so with the latter's consent and by virtue of his retainer. In re Miller's Estate, 71 M 330, 338, 229 P 851.

References

Cited or applied as section 2329, Code

Wills—220, 263, 264.

68 C.J. Wills §§ 631 et seq., 701 et seq.

57 Am. Jur., Wills, §§ 793 et seq.

Right of executor or administrator to contest the will of his deceased. 31 ALR 326.

Right of creditor of heir to contest will. 46 ALR 1490.

Admissibility and credibility of the testimony of subscribing witness tending to impeach execution of will or testamentary capacity of testator. 79 ALR 394.

Necessity of affirmative evidence of testamentary capacity to make prima facie case in will contest. 110 ALR 675.

Right of assignee of expectancy to contest will. 112 ALR 84.

Right of trustee named in earlier will to contest later will. 112 ALR 659.

91-811. (10030) Proof required when no contest. If no person appears to contest the probate of a will, the court or judge may admit the same to probate:

(a) On the testimony of one of the subscribing witnesses only, if he testifies that the will was executed in all particulars as required by law, and that the testator was of sound mind at the time of its execution.

(b) If it appears at the time fixed for the hearing that none of the subscribing witnesses reside in the county, and that the deposition of one of the witnesses to the will can be taken elsewhere, the court may direct it to be taken and may authorize a photographic copy of the will to be made and presented to such witness on his examination, who may be asked the same questions with respect to it and the handwriting of himself, the testator, and the other witness, as would be pertinent and competent if the original will were present.

(c) If none of the subscribing witnesses reside in the county at the time appointed for proving the will, and it is made to appear to the court that the execution of the will cannot be proven under either of the foregoing subdivisions of this section, the court may admit the testimony of other witnesses to prove the sanity of the testator and the execution of the will; and, as evidence of such execution, it may admit proof of the handwriting of the testator and of the subscribing witnesses, or any of them.

History: En. Sec. 18, p. 244, L. 1877; re-en. Sec. 18, 2nd Div. Rev. Stat. 1879; re-en. Sec. 18, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2330, C. Civ. Proc. 1895; re-en. Sec. 7395, Rev. C. 1907; re-en. Sec. 10030, R. C. M. 1921; amd. Sec. 1, Ch. 94, L. 1925. Cal. C. Civ. Proc. Sec. 1308.

Testimony of One Witness Sufficient

While subd. 4 of sec. 91-107 makes two attesting witnesses an indispensable requirement to a valid will, the satisfactory testimony of one witness entitles the will to probate as against the objection of defective execution of the attestation clause under sec. 93-401-1. In re Bragg's Estate, 106 M 132, 139, 76 P 2d 57.

References

In re Silver's Estate, 98 M 141, 38 P

2d 277; Minter v. Minter, 103 M 219, 230, 62 P 2d 283.

Wills↔301.

68 C.J. Wills § 794 et seq.

Admissibility of evidence other than testimony of subscribing witnesses to prove due execution of will, or testamentary capacity. 63 ALR 1195.

Competency of attesting witness who is not benefited by will except as it revokes an earlier will. 64 ALR 1306.

Comment note: Probative value of opinion testimony of handwriting experts that document is not genuine, opposed to testimony of persons claiming to be attesting witnesses. 154 ALR 649.

91-812. (10031) Holographic wills. An holographic will may be proved in the same manner that other private writings are proved.

History: En. Sec. 19, p. 244, L. 1877; re-en. Sec. 19, 2nd Div. Rev. Stat. 1879; re-en. Sec. 19, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2331, C. Civ. Proc. 1895; re-en. Sec. 7396, Rev. C. 1907; re-en. Sec. 10031, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1309.

References

Cited or applied as section 19, Second

Division Compiled Statutes 1887, in Barney v. Hayes, 11 M 571, 29 P 282; In re Irvine's Estate, 114 M 577, 591, 139 P 2d 489.

Wills↔302 (6).

68 C.J. Wills § 823 et seq.

CHAPTER 9

PROBATE PROCEEDINGS—CONTESTING PROBATE OF WILLS

Section	91-901.	Contestant to file grounds of contest, and petitioner to reply.
	91-902.	How jury obtained and trial had.
	91-903.	Verdict of jury—judgment.
	91-904.	Witnesses—who and how many to be examined—proof of handwriting admitted, when.
	91-905.	Testimony reduced to writing for future evidence.
	91-906.	If proved, certificate to be attached.
	91-907.	Will and proof to be filed and recorded.

91-901. (10032) Contestant to file grounds of contest, and petitioner to reply. If any one appears to contest the will, he must file written grounds of opposition to the probate thereof, and serve a copy on the petitioner and other residents of the county interested in the estate, any one or more of whom may demur thereto upon any of the grounds of demurrer provided for in sections 93-3301 to 93-3306. If the demurrer is sustained, the court or judge must allow the contestant a reasonable time, not exceeding ten days, within which to amend his written opposition. If the demurrer is overruled, the petitioner and others interested may jointly or separately answer the contestant's grounds, traversing or otherwise obviating or avoiding the objections. Any issues of fact thus raised, involving:

1. The competency of the decedent to make a last will and testament;
2. The freedom of the decedent at the time of the execution of the will from duress, menace, fraud, or undue influence;
3. The due execution and attestation of the will by the decedent or subscribing witnesses; or,
4. Any other questions substantially affecting the validity of the will; must, on request of either party in writing, filed three days prior to the day set for the hearing, be tried by a jury. If no jury is demanded, the court or judge must try and determine the issues joined. On the trial, the contestant is plaintiff and the petitioner is defendant.

History: En. Sec. 20, p. 245, L. 1877; re-en. Sec. 20, 2nd Div. Rev. Stat. 1879; re-en. Sec. 20, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2340, C. Civ. Proc. 1895; re-en. Sec. 7397, Rev. C. 1907; re-en. Sec. 10032, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1312.

Burden of Proof in General

One who contests the probate of a will occupies the position of a plaintiff, and, under sec. 93-1501-1, he has the affirmative issue, and must prove it or be defeated. In re Murphy's Estate, 43 M 353, 373, 116 P 1004.

Burden of Proof Where Lost Will Was Last Seen in the Possession of the Testator

It being proved that a lost will was last seen in the possession of the testator, who was in the exercise of his mental faculties, the presumption is that he himself destroyed it *animo revocandi*, and the burden of proof is then on the proponent to overcome such presumption. In re Colbert's Estate, 31 M 461, 468, 78 P 971.

Competency of Testator as Grounds for Contest

A will may be contested because of the incompetency of the decedent (this section). In this case, the issue raised and determined was whether the testator was mentally competent at the time he signed the instrument claimed by the proponents to be his last will and testament. In re Bielenberg's Estate, 86 M 521, 528, 284 P 546.

Demurrer to Petition for Probate Does Not Lie

The statute relating to contesting the probate of wills must be strictly followed, and in the absence of a provision for the filing of a demurrer to a petition for probate of a holographic will, the trial court's action in sustaining the demurrer and dismissing the petition, instead of hearing it after objections filed and issues joined as provided by this section, was in effect a refusal to take jurisdiction, an error which could have been corrected by *mandamus*.

In re Augestad's Estate, 107 M 619, 620, 88 P 2d 32.

Effect of Failure to Demand Jury Trial

Where no written demand for a trial by jury had ever been filed by appellants against whose objections an order, directing the sale of certain real estate, was made by the district court, sitting in probate, a jury trial of the issues presented was properly denied; and a demand at the close of the written objections for a jury, which demand was not called to the attention of the court or judge until the hearing began, did not supply the omission. In re Tuohy's Estate, 33 M 230, 242, 83 P 486.

Evidence Admissible as to the Attestation

On the probate of a will, where the subscribing witnesses are out of the state, evidence that they had made statements contradictory of the facts contained in the attestation clause, and evidence that the reputation of such subscribing witnesses for honesty and integrity is bad, is admissible. Farleigh v. Kelley, 28 M 421, 430, 72 P 756.

Grounds for Contest Are as Herein Specified

The only specifications of grounds of contest of a domestic will are to be found in this section, and they are not designated as such, but as the issues which may be raised and which the court is required to try and determine. State ex rel. Ruef v. District Court, 34 M 96, 99, 85 P 866; In re Silver's Estate, 98 M 141, 38 P 2d 277.

Grounds of Contest Unrelated

The grounds of contest of a domestic will enumerated in this section—improper execution, incompetency of testator, undue influence—are unrelated; while they may be joined in one contest, proof of one is in no manner dependent on success or failure of either of the other two; if undue influence or incompetency is shown, due execution of the will becomes immaterial; if the document was not properly executed, undue influence and incompetency fade from consideration. In re Silver's Estate, 98 M 141, 158, 38 P 2d 277.

Pleadings

Where an answer is made to objections interposed to the probate of a will raising issues of fact, it is error for the trial court to entertain a demurrer to such answer and enter judgment thereon, as the court is required to try and determine the issues joined, conducting the trial in accordance with the provisions of the civil practice act, and to render judgment either admitting the will to probate or rejecting

it. Barney v. Hayes, 11 M 99, 107, 27 P 384.

Presumption Against Intestacy—Liberal Construction

The presumption is against intestacy, and it is the policy of courts to sustain a will if it is possible to do so, every reasonable presumption being indulged in favor of its execution, and while the statutory requirements with relation to its execution must be clearly and fully observed, the provisions of the statute and all proceedings thereunder, must under sec. 12-202, be liberally construed to effect its objects and promote justice. In re Bragg's Estate, 106 M 132, 140, 76 P 2d 57.

Proper Allegations Under This Section in a Contest

In a will contest, where contestants alleged that petitioner and others conspired to defraud contestants out of their rights as heirs of deceased, and, pursuant to such conspiracy, had forged the will sought to be probated, evidence that, before this will was offered for probate, petitioner had procured her appointment as administratrix of deceased's estate, falsely alleging that she was his only heir, and, while acting as such administratrix, had sold a large portion of the property of the estate to her husband, and that contestants had instituted an action to have such proceedings set aside, was properly admissible under this section. Farleigh v. Kelley, 28 M 421, 429, 72 P 756.

Review by Supreme Court

In a will contest, the supreme court is concluded by findings based upon conflicting evidence. If the evidence had been submitted to a jury, either party having the right to demand a trial by jury under this section, the verdict would have been conclusive, and the fact that the findings were made by the court does not change the rule. In re Noyes' Estate, 40 M 178, 189, 105 P 1013; In re Murphy's Estate, 43 M 353, 370, 116 P 1004; Murphy v. Nett, 47 M 38, 58, 130 P 451.

Right to Open and Close in Trial

In a will contest, the contestants have the burden of proof, and are entitled to open and close. Farleigh v. Kelley, 28 M 421, 427, 72 P 756; In re Colbert's Estate, 31 M 461, 467, 78 P 871; In re Murphy's Estate, 43 M 353, 373, 116 P 1004; In re Williams' Estate, 50 M 142, 158, 145 P 957.

Security for Costs

Held, on application for writ of supervisory control, that the provision of sec. 93-8623 that when plaintiff in an "action"

is a nonresident of this state, security for costs may be demanded by the defendant, the purpose being to prevent one from starting a groundless action and escaping the consequences of costs by reason of non-residence, applies to will contests, such contests under this section beyond doubt being classified as ordinary civil actions. *State ex rel. Langan v. District Court*, 111 M 178, 180, 107 P 2d 880.

Testimony of One Witness Sufficient

While subd. 4 of sec. 91-107 makes two attesting witnesses an indispensable requirement to a valid will, the satisfactory testimony of one witness entitles the will to probate as against the objection of defective execution of the attestation clause under sec. 93-401-1. *In re Bragg's Estate*, 106 M 132, 139, 76 P 2d 57.

Trial Procedure

The proponent of a will must first make out a *prima facie* case; that is, make such proof as would entitle the will to probate in the absence of a contest. The contestant then attacks its validity, the proponent defends the same, and the contestant rebuts the testimony of the proponent, who may surrebut any new testimony; but the contestant has the right to open and close. *In re Colbert's Estate*, 31 M 461, 467, 78 P 971.

"Undue Influence"—What Constitutes—Evidence and Burden of Proof

Undue influence, sufficient to invalidate a will, must be such as to control the mental operations of the testator, overcome his power of resistance and thus cause him to adopt the will of another in the disposition of his property which he would not have made if left freely to act in accordance with his own pleasure. *Hale v. Smith*, 73 M 481, 486, 237 P 214.

Id. The burden of proving undue influence upon testator in making his will is upon the contestant, and in order to establish it as a fact it must be shown by proof that it was exercised upon the mind of the testator directly to procure its execution, mere suspicion that by reason of the close relation between the testator and the beneficiary, the latter may have had opportunity to ingratiate himself in the former's favor and thus exercise influence over him, being insufficient.

Id. Evidence in an action to set aside a will on the ground of undue influence alleged to have been exercised by a testator's niece, who was made the principal beneficiary under the will, who for the

last nine years of the life of deceased had cared for him and whom he had treated as his own daughter, held to show an entire absence of proof of undue influence, and therefore insufficient to warrant its setting aside on that ground. (Citing section 13-311.)

When Case Shall be Tried Without a Jury

Under this section it is clearly the duty of the court or judge to try the issues joined, without a jury, unless one is demanded in the manner and within the time prescribed therein, and it not only requires the issues to be made up before the demand is made, but also that the demand be made a sufficient length of time before the hearing to secure the attendance of a jury. *In re Tuohy's Estate*, 33 M 230, 242, 83 P 486.

When Contestant Shall File Statement in Opposition to Probate of Will

One desiring to contest a will may file a statement of opposition to the probate of the will at any time prior to the hearing of proof of the will, and possibly the right may continue until the admission to probate. *Raleigh v. District Court*, 24 M 306, 311, 61 P 129. See also *State ex rel. Donovan v. District Court*, 25 M 355, 363, 65 P 120.

When Validity of Certain Wills May be Attacked

The validity of a will that provides for the payment of debts and that appoints an executor, but which disposes of the bulk of the estate to charity, cannot be raised in a proceeding for the probate of the will; it can be determined only after the admission of the will to probate. *In re Hobbins' Estate*, 41 M 39, 49, 108 P 7.

References

In re Cummings' Estate, 92 M 185, 199, 11 P 2d 968.

Wills \Rightarrow 277 et seq.

68 C.J. Wills § 735.

57 Am. Jur., Wills, §§ 759 et seq.

Right of executor or administrator to contest the will of his deceased. 31 ALR 326.

Right of creditor of heir to contest will. 46 ALR 1490.

Right of assignee of expectancy to contest will. 112 ALR 84.

Right of trustee named in earlier will to contest later will. 112 ALR 659.

91-902. (10033) How jury obtained and trial had. When a jury is demanded, the district court must impanel a jury to try the case, in the manner provided for impaneling juries in courts of record; and the trial

must be conducted in accordance with the provisions of sections 93-5001 to 93-5015. A trial by the court must be conducted as provided in sections 93-5301 to 93-5309.

History: En. Sec. 21, p. 245, L. 1877; re-en. Sec. 21, 2nd Div. Rev. Stat. 1879; re-en. Sec. 21, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2341, C. Civ. Proc. 1895; re-en. Sec. 7398, Rev. C. 1907; re-en. Sec. 10033, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1313.

Operation and Effect

An issue in a probate matter is to be tried and determined as an ordinary action, except that a jury trial is a privilege, and not a matter of right. In re Estate of Peterson, 49 M 96, 97, 140 P 237.

91-903. (10034) Verdict of jury—judgment. The jury, after hearing the case, must return a special verdict upon the issues submitted to them by the court, upon which the judgment of the court must be rendered, either admitting the will to probate or rejecting it. In either case, the proofs of the subscribing witnesses must be reduced to writing. If the will be admitted to probate, the judgment, will, and proofs must be recorded.

History: En. Sec. 22, p. 245, L. 1877; re-en. Sec. 22, 2nd Div. Rev. Stat. 1879; re-en. Sec. 22, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2342, C. Civ. Proc. 1895; re-en. Sec. 7399, Rev. C. 1907; re-en. Sec. 10034, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1314.

Operation and Effect

Under this statute the obligation rested upon the court to submit such issues as would be necessary for the proper disposition of the case. The number and form of special interrogatories to be submitted to the jury in a will contest are matters lodged in the discretion of the trial court, so long as they are sufficient to comprehend the issues involved in the case; hence, where it submitted one interrogatory on

Probate Proceeding of Equitable Nature

A proceeding for the probate of a will is a special statutory proceeding, equitable in its nature and, on appeal, is governed by the rules applicable in a suit in equity. In re Bragg's Estate, 106 M 132, 140, 76 P 2d 57.

References

In re Harper's Estate, 98 M 356, 40 P 2d 51.

Wills—312 et seq.

68 C.J. Wills § 863.

57 Am. Jur., Wills, §§ 924 et seq.

the one issue involved, to-wit, the competency of testator at the time he made the will, refusal of three others offered by contestees on the same subject did not show an abuse of discretion, in view of the instructions given thoroughly covering the issue. In re Carroll's Estate, 59 M 403, 414, 196 P 996.

References

Cited or applied as section 7399, Revised Codes, in In re Hobbins' Estate, 41 M 39, 49, 108 P 7.

Wills—322, 333, 353.

68 C.J. Wills §§ 879 et seq., 941 et seq., 989.

57 Am. Jur., Wills, § 924.

91-904. (10035) Witnesses—who and how many to be examined—proof of handwriting admitted, when. If the will is contested, all the subscribing witnesses who are present in the county, and who are of sound mind, must be produced and examined, and the death, absence, or insanity of any of them must be satisfactorily shown to the court or judge. If none of the subscribing witnesses reside in the county at the time appointed for proving the will, the court may admit the testimony of other witnesses to prove the sanity of the testator and the execution of the will; and, as evidence of the execution, it may admit proof of the handwriting of the testator and of the subscribing witnesses, or any of them.

History: En. Sec. 23, p. 246, L. 1877; re-en. Sec. 23, 2nd Div. Rev. Stat. 1879; re-en. Sec. 23, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2343, C. Civ. Proc. 1895; re-en. Sec. 7400, Rev. C. 1907; re-en. Sec. 10035, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1315.

Operation and Effect

The proof of the genuineness of the signature of the dead or absent subscribing witnesses to the attestation clause of a will, when one is appended, is evidence in the case that all the facts recited in it, and which are prerequisites to the due execution of the will, actually took place as therein set forth, and supplies the proof which in many, if not in most, instances it would otherwise be impossible to obtain. This view is further emphasized by the language of this section. *Farleigh v. Kelley*, 28 M 421, 431, 72 P 756.

Id. The provisions defining the term "witnesses," and the circumstances under which contradictory statements may be shown, are modified by this section to the extent that the exigency of the case permits the statement of the subscribing witnesses contained in the attestation clause, though not made under oath, to be received as primary evidence, or, in other words, permits the dead or absent witnesses to speak through the instrumental-

ity of the statute itself, that its requirements have been fully met.

Where the attesting witnesses to a will are present in the county, they must, in a contest, be called and examined, and other testimony to prove the will cannot be received to the exclusion of theirs. Where, however, one is absent and his deposition is introduced, evidence of one not an attesting witness may properly be received to supplement the testimony of the subscribing witness who is present at the hearing. In *re Williams' Estate*, 50 M 142, 151, 145 P 957.

Wills—292 et seq., 322.

68 C.J. Wills §§ 763 et seq., 879 et seq.

Admissibility and credibility of the testimony of subscribing witness tending to impeach execution of will or testamentary capacity of testator. 79 ALR 394.

Necessity of affirmative evidence of testamentary capacity to make prima facie case in will contest. 110 ALR 675.

91-905. (10036) Testimony reduced to writing for future evidence.

The testimony of each witness, reduced to writing and signed by him, shall be good evidence in any subsequent contests concerning the validity of the will, or the sufficiency of the proof thereof, if the witness be dead, or has permanently removed from this state.

History: En. Sec. 24, p. 246, L. 1877; re-en. Sec. 24, 2nd Div. Rev. Stat. 1879; re-en. Sec. 24, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2344, C. Civ. Proc. 1895; re-en. Sec. 7401, Rev. C. 1907; re-en. Sec. 10036, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1316.

References

In *re Bragg's Estate*, 106 M 132, 136, 76 P 2d 57.

Wills—294.

68 C.J. Wills § 766 et seq.

91-906. (10037) If proved, certificate to be attached. If the court or judge is satisfied, upon the proof taken, or from the facts found by the jury, that the will was duly executed, and that the testator at the time of its execution was of sound and disposing mind, and not acting under duress, menace, fraud, or undue influence, a certificate of the proof and the facts found, signed by the judge, and attested by the seal of the court, must be attached to the will.

History: En. Sec. 25, p. 246, L. 1877; re-en. Sec. 25, 2nd Div. Rev. Stat. 1879; re-en. Sec. 25, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2345, C. Civ. Proc. 1895; re-en. Sec. 7402, Rev. C. 1907; re-en. Sec. 10037, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1317.

Operation and Effect

This section shows how the will is admitted to probate. In *re Hobbins' Estate*, 41 M 39, 49, 108 P 7.

Wills—354.

68 C.J. Wills § 959.

91-907. (10038) Will and proof to be filed and recorded. The will, and a certificate of the proof thereof, must be filed and recorded by the clerk, and the same, when so filed and recorded, shall constitute part of the record in the cause or proceeding. All testimony shall be filed by the clerk.

History: En. Sec. 26, p. 246, L. 1877; 1879; re-en. Sec. 26, 2nd Div. Comp. Stat. 1887; amd. Sec. 2346, C. Civ. Proc. 1895; re-en. Sec. 26, p. 197, 2nd Div. Rev. Stat.

re-en. Sec. 7403, Rev. C. 1907; re-en. Sec. 10038, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1318.

Cross-Reference

Index of wills, sec. 16-2905.

References

Cited or applied as section 2346, Code of Civil Procedure, in *Raleigh v. District Court*, 24 M 306, 311, 61 P 129; *Farleigh v. Kelley*, 28 M 421, 427, 72 P 756; In re *Colbert's Estate*, 31 M 461, 467, 78 P 971.

CHAPTER 10

PROBATE OF FOREIGN WILLS

- Section 91-1001. Wills proved in other states to be recorded, when and where.
 91-1002. Proceedings on production of foreign will.
 91-1003. Hearing proofs of probate of foreign will.

91-1001. (10039) Wills proved in other states to be recorded, when and where. All wills duly proved and allowed in any other of the United States, or in any foreign country or state, may be allowed and recorded in the district court of any county in which the testator shall have left any estate, or shall have been a resident at the time of his death.

History: En. Sec. 27, p. 246, L. 1877; re-en. Sec. 27, 2nd Div. Rev. Stat. 1879; re-en. Sec. 27, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2350, C. Civ. Proc. 1895; re-en. Sec. 7404, Rev. C. 1907; re-en. Sec. 10039, R. C. M. 1921; amd. Sec. 1, Ch. 44, L. 1939. Cal. C. Civ. Proc. Sec. 1322.

Operation and Effect

A decree of a court admitting a will to probate establishes such instrument as a will, and while the decree may be subject to attack in a proper proceeding, and open to review on appeal, yet, until set aside, such decree is conclusive of all facts necessary to the validity of the will. *State ex rel. Ruef v. District Court*, 34 M 96, 102, 85 P 866.

A will made in another state by a resident of Montana is subject to probate

under sec. 91-701, relating to domestic wills, though proved and allowed in the foreign state, and not under secs. 91-1001 to 91-1003, providing the manner in which a foreign will upon the production of a duly authenticated copy thereof and its probate in another state may be admitted to probate in this state. In re *Mauldin's Estate*, 69 M 132, 135 et seq., 220 P 1102.

Id. It is the policy of the state to retain original jurisdiction of the probate of the wills of its residents, and it is not required, under the full faith and credit clause of the Constitution, to permit such a will to be probated first in another state and then grant ancillary administration on the foreign record.

Wills—238-246.

68 C.J. Wills § 656 et seq.

91-1002. (10040) Proceedings on production of foreign will. When a copy of the will and probate thereof duly authenticated shall be produced by the executor, or by any other person, with a petition for letters, the same must be filed, and a court or judge must proceed to hear said petition and no notice of the hearing of said petition need be given. Provided further that all orders heretofore made admitting foreign wills to probate wherein the executor or any heir has requested in writing the appointment of the person who was appointed are hereby declared valid, whether notice of the hearing was given or not.

History: En. Sec. 28, p. 246, L. 1877; re-en. Sec. 28, 2nd Div. Rev. Stat. 1879; re-en. Sec. 28, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2351, C. Civ. Proc. 1895; re-en. Sec. 7405, Rev. C. 1907; re-en. Sec. 10040, R. C. M. 1921; amd. Sec. 1, Ch. 192, L. 1935; amd. Sec. 1, Ch. 187, L. 1943. Cal. C. Civ. Proc. Sec. 1323.

Operation and Effect

While the code does not in express terms

provide for the probate of a will executed in another state, it does so impliedly by this section, which makes provision for a hearing of such application and notice thereof. *State ex rel. Ruef v. District Court*, 34 M 96, 99, 85 P 866.

Under this section and 93-1001-17, an attestation by the clerk of a probate court of another state that papers constituting the record of proceedings in that court were true and correct copies of the will

and its probate there, without a certificate of the judge "that the attestation is in due form," was insufficient to entitle them to be admitted in evidence in this state, not being duly authenticated as required by this section. *Henderson et al. v. Daniels*, 62 M 363, 376, 205 P 964.

Id. The filing of a petition for the probate of a foreign will unaccompanied "by a copy of the will duly authenticated" as required by this section, did not confer

jurisdiction upon the district court to make an order admitting it to probate in this state.

References

In re Mauldin's Estate, 69 M 132, 135 et seq., 220 P 1102; *In re Coppock's Estate*, 72 M 431, 433, 234 P 258.

57 Am. Jur., Wills, §§ 954 et seq.

91-1003. (10041) Hearing proofs of probate of foreign will. If, on the hearing, it appears upon the face of the record that the will has been proved, allowed, and admitted to probate in any other of the United States, or in any foreign country, and that it was executed according to the law of the place in which the same was made, or in which the testator was at the time domiciled, or in conformity with the laws of this state, it must be admitted to probate, and have the same force and effect as a will first admitted to probate in this state, and letters testamentary or of administration issued thereon.

History: En. Sec. 29, p. 247, L. 1877; re-en. Sec. 29, 2nd Div. Rev. Stat. 1879; re-en. Sec. 29, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2352, C. Civ. Proc. 1895; re-en. Sec. 7406, Rev. C. 1907; re-en. Sec. 10041, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1324.

Operation and Effect

While no particular grounds of contesting an application for the probate of a foreign will are expressly designated in the code, this section does enumerate the

findings which the trial court must make before admitting such will to probate, and these may be accepted as questions with respect to which issues may be raised, and therefore the grounds of such contest. *State ex rel. Ruef v. District Court*, 34 M 96, 99, 85 P 866.

References

In re Mauldin's Estate, 69 M 132, 135 et seq., 220 P 1102; *In re Coppock's Estate*, 72 M 431, 433, 234 P 258.

CHAPTER 11

PROBATE PROCEEDINGS—CONTESTING WILLS AFTER PROBATE

- Section** 91-1101. The probate may be contested within one year.
 91-1102. Citation to be issued to parties interested.
 91-1103. The hearing had on proof of service.
 91-1104. Petitions to revoke probate of will tried by jury or court—judgment.
 91-1105. On revocation of probate, powers of executor, etc., cease, but not liable for acts in good faith.
 91-1106. Costs and expenses—by whom paid.
 91-1107. Probate—when conclusive—one year after removal of disability given to infants and others.

91-1101. (10042) The probate may be contested within one year. When a will has been admitted to probate, any person interested may, at any time within one year after such probate, contest the same or the validity of the will. For that purpose he must file in the court in which the will was proved a petition in writing, containing his allegations against the validity of the will or against the sufficiency of the proof, and praying that the probate may be revoked.

History: En. Sec. 30, p. 247, L. 1877; re-en. Sec. 30, 2nd Div. Rev. Stat. 1879; re-en. Sec. 30, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2360, C. Civ. Proc. 1895; re-en. Sec. 7407, Rev. C. 1907; re-en. Sec. 10042, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1327.

Operation and Effect

Only those who, but for the will, would succeed in some degree to the decedent's estate, are authorized to contest or seek revocation of the probate of a will. *State ex rel. Donovan v. District Court*, 25 M

355, 365, 65 P 120; In re Pepin's Estate, 53 M 240, 246, 163 P 104.

On the expiration of one year within which a will after probate may be contested, as provided by this section, which is in effect a statute of limitations, the running of which commences with the date of the admission of the will to probate, the probate becomes final and is not open to either direct or collateral attack. In re Estate of Murphy, 57 M 273, 188 P 146.

Federal court was without jurisdiction to set aside decree of probate court of state when law provided ample means for revision and correction of probate decrees by probate courts themselves. Montgomery v. Gilbert, 77 F 2d 39.

Setting Aside for Extrinsic Fraud—Equity

One desiring to contest or set aside the probate of a will under this section must act within one year after probate; any proceeding thereafter in that behalf (in

the instant case on the ground that probate was secured by extrinsic fraud) is addressed to the equitable jurisdiction of the district court. Minter v. Minter, 103 M 219, 228, 62 P 2d 283.

Id. While courts of equity have inherent power to set aside judgments or decrees obtained by fraud, the fraud justifying action must be extrinsic or collateral to the matter tried by the court; evidence showing intrinsic fraud is insufficient to warrant relief.

References

Cited or applied as sec. 2360, Code of Civil Procedure, in Raleigh v. District Court, 24 M 306, 315, 61 P 129; In re Toomey's Estate, 96 M 489, 496, 31 P 2d 729; In re Silver's Estate, 98 M 141, 38 P 2d 277.

Wills—225, 260, 278 et seq.

68 C.J. Wills §§ 667 et seq., 697, 725 et seq.

91-1102. (10043) Citation to be issued to parties interested. Upon filing the petition, a citation must be issued to the executors of the will, or to the administrators with the will annexed, and to all the legatees and devisees mentioned in the will, and heirs residing in the state, so far as known to the petitioner, or to their guardians, if any of them are minors, or to their personal representatives, if any of them are dead, requiring them to appear before the court or judge on some day therein specified to show cause why the probate of the will should not be revoked.

History: En. Sec. 31, p. 247, L. 1877; re-en. Sec. 31, 2nd Div. Rev. Stat. 1879; re-en. Sec. 31, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2361, C. Civ. Proc. 1895; re-en. Sec. 7408, Rev. C. 1907; re-en. Sec. 10043, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1328.

Operation and Effect

We hold the executor was a necessary and proper party defendant to this action. The amended complaint herein, it is true seeks to determine heirship but it seeks also revocation of the probate of the will

and to have the will declared invalid. That being the case, citation to the executor to appear should have been issued and served. It was not done but he came in voluntarily and answered and his answer was permitted to stand, as was proper. Being lawfully and properly a defendant, the executor had a right to defend in the trial court. In re Bernheim's Estate, 82 M 198, 206, 266 P 378.

Wills—270.

68 C.J. Wills § 711 et seq.

91-1103. (10044) The hearing had on proof of service. At the time appointed for showing cause, or at any time to which the hearing is postponed, personal service of the citations having been made upon any persons named therein, the court or judge must proceed to try the issues of fact joined in the same manner as in an original contest of a will.

History: En. Sec. 32, p. 247, L. 1877; re-en. Sec. 32, 2nd Div. Rev. Stat. 1879; re-en. Sec. 32, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2362, C. Civ. Proc. 1895; re-en. Sec. 7409, Rev. C. 1907; re-en. Sec. 10044, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1329.

Wills—312 et seq.

68 C.J. Wills § 863.

91-1104. (10045) Petitions to revoke probate of will tried by jury or court—judgment. In all cases of petitions to revoke the probate of a will, wherein the original probate was granted without a contest, on written de-

mand of either party, filed three days prior to the hearing, a trial by jury must be had as in cases of the contest of an original petition to admit a will to probate. If, upon hearing the proofs of the parties, the jury shall find, or, if no jury is had, the court or judge shall decide, that the will is for any reason invalid, or that it is not sufficiently proved to be the last will of the testator, the probate must be annulled and revoked.

History: En. Sec. 33, p. 248, L. 1877; re-en. Sec. 33, 2nd Div. Rev. Stat. 1879; re-en. Sec. 33, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2363, C. Civ. Proc. 1895; re-en. Sec. 7410, Rev. C. 1907; re-en. Sec. 10045, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1330.

Wills⊕316-318.

68 C.J. Wills §§ 836 et seq.

91-1105. (10046) On revocation of probate, powers of executor, etc., cease, but not liable for acts in good faith. Upon the revocation being made, the powers of the executor or administrator with the will annexed must cease; but such executor or administrator shall not be liable for any act done in good faith previous to the revocation.

History: En. Sec. 34, p. 248, L. 1877; re-en. Sec. 34, 2nd Div. Rev. Stat. 1879; re-en. Sec. 34, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2364, C. Civ. Proc. 1895; re-en. Sec. 7411, Rev. C. 1907; re-en. Sec. 10046, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1331.

Executors and Administrators⊕31, 539.

33 C.J.S. Executors and Administrators § 78; 34 C.J.S. Executors and Administrators §§ 1039, 1065, 1066.

91-1106. (10047) Costs and expenses—by whom paid. The fees and expenses must be paid by the party contesting the validity or probate of the will, if the will in probate is confirmed. If the probate is revoked, the costs must be paid by the party who resisted the revocation, or out of the property of the decedent, as the court directs.

History: En. Sec. 35, p. 248, L. 1877; re-en. Sec. 35, 2nd Div. Rev. Stat. 1879; re-en. Sec. 35, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2365, C. Civ. Proc. 1895; re-en. Sec. 7412, Rev. C. 1907; re-en. Sec. 10047, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1332.

91-4318, out of the assets of the estate. In re Baxter's Estate, 94 M 257, 268 et seq., 22 P 2d 182.

In matters relating to a will contest after probate the above special statute controls over the general statute, sec. 91-3405, with respect to expenses and costs. In re Kesl's Estate, 117 M 377, 383, 161 P 2d 641.

Id. Under this section legislature intended that, when the will is revoked, no liability should attach other than the costs, as judicially determined and defined by the supreme court.

Id. If contest of a will previously admitted to probate is successful, costs may be chargeable against the executor who resisted revocation or, in the discretion of the court, may be taken from the assets of the estate, but attorneys' fees for services in defense of a will contest are not included within the term "costs," and hence such fees cannot be recovered from the estate.

Operation and Effect

Under this section, the trial court may in its discretion order that the costs incident to the revocation of the probate of a will be paid out of the property of the decedent if the revocation was resisted in good faith and upon substantial grounds, or, in case of bad faith and without justification, tax them against the party who resisted revocation. In re Carroll's Estate, 59 M 403, 415, 196 P 996.

Id. Held, under the above rule, that where executors would have been remiss in the performance of their duty had they not made defense against the attack upon the will sought to be set aside, and there was ample justification for the defense, the district court abused its discretion in taxing the costs against executors individually.

Attorneys' fees incurred by a devisee under a will to defend a contest thereof are not allowable as costs and disbursements within the purview of sec. 93-8601 et seq., nor under this section and section

References

In re Mickich's Estate, 114 M 258, 278, 136 P 2d 223.

Wills⊕405.

68 C.J. Wills § 1068 et seq.

91-1107. (10048) Probate—when conclusive—one year after removal of disability given to infants and others. If no person, within one year after the probate of a will, contest the same or the validity thereof, the probate of the will is conclusive; saving to infants and persons of unsound mind a like period of one year after their respective disabilities are removed.

History: En. Sec. 36, p. 249, L. 1877; re-en. Sec. 36, 2nd Div. Rev. Stat. 1879; re-en. Sec. 36, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2366, C. Civ. Proc. 1895; re-en. Sec. 7413, Rev. C. 1907; re-en. Sec. 10048, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1333.

Operation and Effect

Where a testator had no resident heirs, the state was entitled to file objections to the probate of the will before the expiration of five years from testator's death; otherwise the right to contest would be barred by this section. *State ex rel. Donovan v. District Court*, 25 M 355, 366, 65 P 120. See also *State ex rel. Donovan v. Ledwidge*, 27 M 197, 203, 70 P 511.

The successful contest of a will, after probate and distribution of the estate, by a minor on coming of age, operates only in his favor, and not in favor of those heirs who have lost their right to contest

by a failure to institute proper proceedings within the time allowed by this section. *Spencer v. Spencer*, 31 M 631, 637, 79 P 320.

An heir who has acquiesced in the settlement and final distribution of an estate is estopped to call such settlement and distribution in question, or to compel the return of, or an accounting for, the property thus parted with by the executor or administrator in good faith. *Spencer v. Spencer*, 31 M 631, 638, 79 P 320.

Federal court was without jurisdiction to set aside decree of probate court of state when law provided ample means for revision and correction of probate decrees by probate courts themselves. *Montgomery v. Gilbert*, 77 F 2d 39.

Wills—423-434.

68 C.J. Wills § 1092 et seq.

CHAPTER 12

PROBATE OF LOST OR DESTROYED WILLS AND OF NUNCUPATIVE WILLS

- Section** 91-1201. Proof of lost or destroyed will to be taken.
 91-1202. Must have been in existence at time of death.
 91-1203. To be certified, recorded and letters thereon granted.
 91-1204. Court to restrain injurious acts of executors or administrators during proceedings to prove lost will.
 91-1205. Nuncupative wills—when and how admitted to probate.
 91-1206. Additional requirements in probate of nuncupative wills.
 91-1207. Contests and appointments to conform to provisions as to other wills.

91-1201. (10049) Proof of lost or destroyed will to be taken. Whenever any will is lost or destroyed, the district court must take proof of the execution and validity thereof, and establish the same; notice to all persons interested being first given, as prescribed in regard to proofs of wills as in other cases. All the testimony given must be reduced to writing, and signed by the witnesses.

History: En. Sec. 37, p. 249, L. 1877; re-en. Sec. 37, 2nd Div. Rev. Stat. 1879; re-en. Sec. 37, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2370, C. Civ. Proc. 1895; re-en. Sec. 7414, Rev. C. 1907; re-en. Sec. 10049, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1338.

References

Cited or applied as section 2370, Code of Civil Procedure, in *In re Colbert's Estate*, 31 M 461, 467, 78 P 971.

Wills—231-237.

68 C.J. Wills § 651 et seq.

57 Am. Jur., Wills, §§ 969 et seq.

91-1202. (10050) Must have been in existence at time of death. No will shall be proved as a lost or destroyed will, unless the same is proved to have been in existence at the time of the death of the testator, or is shown to have been fraudulently destroyed in the lifetime of the testator, nor unless

its provisions are clearly and distinctly proved by at least two credible witnesses.

History: En. Sec. 38, p. 249, L. 1877; re-en. Sec. 38, 2nd Div. Rev. Stat. 1879; re-en. Sec. 38, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2371, C. Civ. Proc. 1895; re-en. Sec. 7415, Rev. C. 1907; re-en. Sec. 10050, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1339.

References

Cited or applied as section 2371, Code of Civil Procedure, in *In re Colbert's Estate*, 31 M 461, 467, 78 P 971.

Wills⌚233, 234, 302 (8).
68 C.J. Wills §§ 651 et seq., 821 et seq.

91-1203. (10051) To be certified, recorded and letters thereon granted.

When a lost will is established, the provisions thereof must be distinctly stated and certified by the judge, under his hand and the seal of the court, and the certificate must be filed and recorded as other wills are filed and recorded, and letters testamentary or of administration, with the will annexed, must be issued thereon in the same manner as upon wills produced and duly proved. The testimony must be reduced to writing, signed, certified, and filed as in other cases, and shall have the same effect as evidence as provided in section 91-905.

History: En. Sec. 39, p. 249, L. 1877; re-en. Sec. 39, 2nd Div. Rev. Stat. 1879; re-en. Sec. 39, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2372, C. Civ. Proc. 1895; re-en. Sec. 7416, Rev. C. 1907; re-en. Sec. 10051, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1340.

References

Cited or applied as section 2372, Code of Civil Procedure, in *In re Colbert's Estate*, 31 M 461, 467, 78 P 971.

Wills⌚345-354.
68 C.J. Wills § 952 et seq.

91-1204. (10052) Court to restrain injurious acts of executors or administrators during proceedings to prove lost will. If, before or during the pendency of an application to prove a lost or destroyed will, letters of administration are granted on the estate of the testator, or letters testamentary of any previous will of the testator are granted, the court may restrain the administrators or executors, so appointed, from any acts or proceedings which would be injurious to the legatees or devisees claiming under the lost or destroyed will.

History: En. Sec. 40, p. 249, L. 1877; re-en. Sec. 40, 2nd Div. Rev. Stat. 1879; re-en. Sec. 40, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2373, C. Civ. Proc. 1895; re-en. Sec. 7417, Rev. C. 1907; re-en. Sec. 10052, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1341.

Executors and Administrators⌚76.
33 C.J.S. Executors and Administrators § 147.

91-1205. (10053) Nuncupative wills—when and how admitted to probate. Nuncupative wills may at any time, within six months after the testamentary words are spoken by the decedent, be admitted to probate, on petition and notice as provided in sections 91-801 to 91-812. The petition, in addition to the jurisdictional facts, must allege that the testamentary words, or the substance thereof, were reduced to writing within thirty days after they were spoken, which writing must accompany the petition.

History: En. Sec. 41, p. 249, L. 1877; re-en. Sec. 41, 2nd Div. Rev. Stat. 1879; re-en. Sec. 41, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2380, C. Civ. Proc. 1895; re-en. Sec. 7418, Rev. C. 1907; re-en. Sec. 10053, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1344.

Wills⌚146, 209, 260, 274.
68 C.J. Wills §§ 428, 596 et seq., 697, 737 et seq.

91-1206. (10054) Additional requirements in probate of nuncupative wills. The district court or judge must not receive or entertain a petition for the probate of a nuncupative will until the lapse of ten days from the death of the testator, nor must such petition at any time be acted on until the testamentary words are, or their substance is, reduced to writing and filed with the petition, nor until the surviving husband or wife, if any, and all other persons resident in the state or county, interested in the estate, are notified as hereinbefore provided.

History: En. Sec. 42, p. 250, L. 1877; re-en. Sec. 42, 2nd Div. Rev. Stat. 1879; re-en. Sec. 42, 2nd Div. Comp. Stat. 1887; amd. Sec. 2381, C. Civ. Proc. 1895; re-en. Sec. 7419, Rev. C. 1907; re-en. Sec. 10054, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1345.

Wills 146, 259, 269.
68 C.J. Wills §§ 428, 694 et seq., 711 et seq.

91-1207. (10055) Contests and appointments to conform to provisions as to other wills. Contests of the probate of nuncupative wills, and appointments of executors and administrators of the estate devised thereby, must be had, conducted, and made as hereinbefore provided in cases of the probate of written wills.

History: En. Sec. 43, p. 250, L. 1877; re-en. Sec. 43, 2nd Div. Rev. Stat. 1879; re-en. Sec. 43, 2nd Div. Comp. Stat. 1887; amd. Sec. 2382, C. Civ. Proc. 1895; re-en. Sec. 7420, Rev. C. 1907; re-en. Sec. 10055, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1346.

References

Cited or applied as section 2382, Code of Civil Procedure, in *In re Davis' Estate*, 27 M 490, 496, 71 P 757.

Wills 209 et seq.
68 C.J. Wills § 596 et seq.

CHAPTER 13

PROBATE PROCEEDINGS—EXECUTORS AND ADMINISTRATORS—ISSUANCE OF LETTERS TESTAMENTARY AND OF ADMINISTRATION

- Section 91-1301. To whom letters on proved will to issue.
91-1302. Who are incompetent as executors or administrators—letters with will annexed to issue, when.
91-1303. Interested parties may file objections.
91-1304. Authority of unmarried woman not extinguished by her marriage—appointment of married woman.
91-1305. Executor of an executor.
91-1306. Letters testamentary to a minor or person absent from state.
91-1307. Acts of a portion of executors valid.
91-1308. Authority of administrators with will annexed—letters—how issued.
91-1309. Form of letters testamentary.
91-1310. Form of letters of administration with the will annexed.
91-1311. Form of letters of administration.
91-1312. Transcript of court minutes to be evidence.

91-1301. (10056) To whom letters on proved will to issue. The court or judge admitting a will to probate, after the same is proved and allowed, must issue letters thereon to the persons named therein as executors, who are competent to discharge the trust, who must appear and qualify, unless objection is made, as provided in section 91-1303.

History: En. Sec. 44, p. 250, L. 1877; re-en. Sec. 44, 2nd Div. Rev. Stat. 1879; re-en. Sec. 44, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2400, C. Civ. Proc. 1895; re-en. Sec. 7421, Rev. C. 1907; re-en. Sec. 10056, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1349.

Cross-Reference

Motor vehicles, transfer of title, dispensing with probate proceedings, sec. 53-109.

Executors and Administrators 14, 20.

33 C.J.S. Executors and Administrators §§ 23-27.

21 Am. Jur. 419-428, Executors and Administrators, §§ 82-95.

Nature of residence contemplated by statute or rule making residence within the state qualification of executor or administrator. 18 ALR 581.

Preference respecting as executor or administrator in favor of person in deferred class of next of kin named in the statute, but not beneficially interested in particular estate. 70 ALR 1466.

Power of court to refuse letters testamentary to one named in will as executor, absent specific statutory disqualifications. 95 ALR 828.

Propriety of appointing or refusing to appoint as executor or administrator one who had become an executor de son tort. 157 ALR 237.

Physical condition as affecting competency to act as executor or administrator. 158 ALR 296.

91-1302. (10057) Who are incompetent as executors or administrators—letters with will annexed to issue, when. No person is competent to serve as executor who, at the time the will is admitted to probate, is:

1. Under the age of majority;
2. Convicted of an infamous crime;
3. Adjudged by the court or judge incompetent to execute the duties of the trust by reason of drunkenness, improvidence, or want of understanding or integrity.

If the sole executor or all the executors are incompetent, or renounce, or fail to apply for letters, or to appear and qualify, letters of administration, with the will annexed, must be issued as designated and provided for the grant of letters in cases of intestacy.

History: En. Sec. 45, p. 250, L. 1877; re-en. Sec. 45, 2nd Div. Rev. Stat. 1879; re-en. Sec. 45, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2401, C. Civ. Proc. 1895; re-en. Sec. 7422, Rev. C. 1907; re-en. Sec. 10057, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1350.

References

Cited or applied as section 2401, Code of Civil Procedure, in In re Connor's Es-

tate, 16 M 465, 466, 41 P 271; In re Kern's Estate, 96 M 443, 448, 31 P 2d 313.

Executors and Administrators—15, 21 (1).

33 C.J.S. Executors and Administrators § 28; 34 C.J.S. Executors and Administrators § 1031.

21 Am. Jur. 421, Executors and Administrators, § 84.

91-1303. (10058) Interested parties may file objections. Any person interested in a will may file objections, in writing, to granting letters testamentary to the persons named as executors, or any of them, and the objections must be heard and determined by the court or judge; a petition may, at the same time, be filed for letters of administration with the will annexed.

History: En. Sec. 46, p. 250, L. 1877; re-en. Sec. 46, 2nd Div. Rev. Stat. 1879; re-en. Sec. 46, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2402, C. Civ. Proc. 1895; re-en. Sec. 7423, Rev. C. 1907; re-en. Sec. 10058, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1351.

Executors and Administrators—20 (6), 21 (2).

33 C.J.S. Executors and Administrators § 57; 34 C.J.S. Executors and Administrators § 1032.

91-1304. (10059) Authority of unmarried woman not extinguished by her marriage—appointment of married woman. When an unmarried woman appointed executrix marries, her authority is not extinguished. When a married woman is named as executrix, she may be appointed and serve in every respect as an unmarried woman.

History: En. Sec. 47, p. 251, L. 1877; re-en. Sec. 47, 2nd Div. Rev. Stat. 1879;

re-en. Sec. 47, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2403, C. Civ. Proc. 1895; re-en.

Sec. 7424, Rev. C. 1907; re-en. Sec. 10059,
R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1352.

33 C.J.S. Executors and Administrators
§§ 28, 78; 34 C.J.S. Executors and Admin-
istrators § 1039.

Executors and Administrators—15, 31.

91-1305. (10060) Executor of an executor. No executor of an executor shall, as such, be authorized to administer on the estate of the first testator, but on the death of the sole or surviving executor of any last will, letters of administration with the will annexed, of the estate of the first testator, left unadministered, must be issued.

History: En. Sec. 48, p. 251, L. 1877;
re-en. Sec. 48, 2nd Div. Rev. Stat. 1879;
re-en. Sec. 48, 2nd Div. Comp. Stat. 1887;
re-en. Sec. 2404, C. Civ. Proc. 1895; re-en.
Sec. 7425, Rev. C. 1907; re-en. Sec. 10060,
R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1353.

Executors and Administrators—21 (1),
128.

34 C.J.S. Executors and Administrators
§§ 1031, 1049.

91-1306. (10061) Letters testamentary to a minor or person absent from state. Where a person absent from the state, or a minor, is named executor—if there is another executor who accepts the trust and qualifies—the latter may have letters testamentary and administer the estate until the return of the absentee or the majority of the minor, who may then be admitted as joint executor. If there is no other executor, letters of administration with the will annexed must be granted; but the court or judge may, in its or his discretion, revoke them on the return of the absent executor or the arrival of the minor at the age of majority.

History: En. Sec. 49, p. 251, L. 1877;
re-en. Sec. 49, 2nd Div. Rev. Stat. 1879;
re-en. Sec. 49, 2nd Div. Comp. Stat. 1887;
re-en. Sec. 2405, C. Civ. Proc. 1895; re-en.
Sec. 7426, Rev. C. 1907; re-en. Sec. 10061,
R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1354.

Executors and Administrators—14, 18,
21 (1), 32 (1).

33 C.J.S. Executors and Administrators
§§ 23-27, 46, 86; 34 C.J.S. Executors and
Administrators §§ 1031, 1038.

91-1307. (10062) Acts of a portion of executors valid. When all the executors named are not appointed by the court or judge, those appointed have the same authority to perform all acts and discharge the trust, required by the will, as effectually for every purpose as if all were appointed and should act together; where there are two executors or administrators, the act of one alone shall be effectual, if the other is absent from the state, or laboring under any legal disability from serving, or if he has given his co-executor or co-administrator authority, in writing, to act for both; and where there are more than two executors or administrators, the act of a majority is valid.

History: En. Sec. 50, p. 252, L. 1877;
re-en. Sec. 50, 2nd Div. Rev. Stat. 1879;
re-en. Sec. 50, 2nd Div. Comp. Stat. 1887;
re-en. Sec. 2406, C. Civ. Proc. 1895; re-en.
Sec. 7427, Rev. C. 1907; re-en. Sec. 10062,
R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1355.

tion of the produce from the land as
rental over objection of his co-representa-
tive. *Thompson v. Flynn*, 102 M 446, 453,
58 P 2d 769.

References

State v. Daems, 97 M 486, 496, 37 P
2d 322.

Executors and Administrators—124,
126.

34 C.J.S. Executors and Administrators
§§ 1043, 1044.

Operation and Effect

One of two administrators could not, under this section, effectively bind the estate of a deceased partner by an agreement with the surviving partner in charge of the partnership landed property under which the administrator accepted a por-

91-1308. (10063) Authority of administrators with will annexed—letters—how issued. Administrators with the will annexed have the same authority over estates which executors named in the will would have, and their acts are as effectual for all purposes. Their letters must be signed by the clerk of the court, and bear the seal thereof.

History: En. Sec. 51, p. 252, L. 1877; re-en. Sec. 51, 2nd Div. Rev. Stat. 1879; re-en. Sec. 51, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2407, C. Civ. Proc. 1895; re-en. Sec. 7428, Rev. C. 1907; re-en. Sec. 10063, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1356.

Operation and Effect

Under a will, executed by a nonresident owning estate in Montana, directing the executor to sell all the property of the estate at public or private sale at such times as he might deem for the best

interests of the estate, an ancillary administrator with the will annexed has, under this section, the same authority over the estate as the executor would have, and may sell the property without an order of court. In *re Livingston's Estate*, 91 M 584, 595, 9 P 2d 159.

Executors and Administrators 21 (2), 121 (1).

34 C.J.S. Executors and Administrators §§ 1032, 1034.

91-1309. (10064) Form of letters testamentary. Letters testamentary must be substantially in the following form:

"State of Montana, county of..... The last will of A B, deceased, a copy of which is hereto annexed, having been proved and recorded in the district court of the county of....., C D, who is named therein as such, is hereby appointed executor. Witness, G H, clerk of the district court of the county of....., with the seal of the court affixed, the day of, A. D. 19.....

(Seal.) By order of the court.

G H, Clerk."

History: En. Sec. 52, p. 252, L. 1877; re-en. Sec. 52, 2nd Div. Rev. Stat. 1879; re-en. Sec. 52, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2420, C. Civ. Proc. 1895; re-en. Sec. 7429, Rev. C. 1907; re-en. Sec. 10064, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1360.

Executors and Administrators 27.

33 C.J.S. Executors and Administrators § 69.

91-1310. (10065) Form of letters of administration with the will annexed. Letters of administration with the will annexed must be substantially in the following form:

"State of Montana, county of..... The last will of A B, deceased, a copy of which is hereto annexed, having been proved and recorded in the district court of the county of....., and there being no executor named in the will (or as the case may be), C D is hereby appointed administrator with the will annexed. Witness, G H, clerk of the district court of the county of....., with the seal of the court affixed, the day of, A. D. 19.....

(Seal.) By order of the court.

G H, Clerk."

History: En. Sec. 53, p. 252, L. 1877; re-en. Sec. 53, 2nd Div. Rev. Stat. 1879; re-en. Sec. 53, 2nd Div. Comp. Stat. 1887;

re-en. Sec. 2421, C. Civ. Proc. 1895; re-en. Sec. 7430, Rev. C. 1907; re-en. Sec. 10065, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1361.

91-1311. (10066) Form of letters of administration. Letters of administration must be signed by the clerk, under the seal of the court, and substantially in the following form:

"State of Montana, County of..... C D is hereby appointed administrator of the estate of A B, deceased. Witness, G H, clerk of the

district court of the county of _____, with the seal thereof affixed, the _____ day of _____, A. D. 19_____.

(Seal.) By order of the court.

G H, Clerk."

History: En. Sec. 54, p. 252, L. 1877; re-en. Sec. 2422, C. Civ. Proc. 1895; re-en. Sec. 54, 2nd Div. Rev. Stat. 1879; Sec. 7431, Rev. C. 1907; re-en. Sec. 10066, re-en. Sec. 54, 2nd Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1362.

91-1312. (10067) Transcript of court minutes to be evidence. A transcript from the minutes of the court, showing the appointment of any person as executor or administrator, together with the certificate of the clerk, under his hand and the seal of the court, that such person has given bond and been qualified, and that letters testamentary or of administration have been issued to him and have not been revoked, shall have the same effect in evidence as the letters themselves.

History: En., with Secs. 10114-10119, Sec. 7483, Rev. C. 1907; re-en. Sec. 10067, R. C. M. 1921, in L. 1877. R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1429.

This section en. Sec. 108, p. 264, L. 1877; re-en. Sec. 108, 2nd Div. Rev. Stat. 1879; re-en. Sec. 108, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2516, C. Civ. Proc. 1895; re-en.

Evidence 340 (3) et seq.; Executors and Administrators 28.

32 C.J.S. Evidence §§ 653, 654; 33 C.J.S. Executors and Administrators §§ 70, 71.

CHAPTER 14

PERSONS TO WHOM AND ORDER IN WHICH LETTERS OF ADMINISTRATION ARE GRANTED

- Section 91-1401. Order of persons entitled to administer—partner not to administer.
 91-1402. Preference of persons equally entitled.
 91-1403. In discretion of court or judge to appoint administrator, when.
 91-1404. When minor entitled, who appointed administrator.
 91-1405. Who are incompetent to act as administrators.
 91-1406. Married woman may be administratrix.

91-1401. (10068) Order of persons entitled to administer—partner not to administer. Administration of estate of all persons dying intestate must be granted to some one or more of the persons hereinafter mentioned, and they are respectively entitled to preference thereto in the following order:

1. The surviving husband or wife, or some competent person whom he or she may request to have appointed.
2. The children.
3. The father or mother.
4. The brothers.
5. The sisters.
6. The grandchildren.
7. The next of kin entitled to share in the distribution of the estate.
8. The public administrator.
9. A creditor.
10. Any person legally competent.

If the decedent was a member of a partnership at the time of his decease, the surviving partner must in no case be appointed administrator of the estate.

History: En. Sec. 55, p. 253, L. 1877; amd. Sec. 55, 2nd Div. Comp. Stat. 1887; re-en. Sec. 55, 2nd Div. Rev. Stat. 1879; amd. Sec. 2430, C. Civ. Proc. 1895; re-en.

Sec. 7432, Rev. C. 1907; re-en. Sec. 10068, R. C. M. 1921; amd. Sec. 1, Ch. 219, L. 1939. Cal. C. Civ. Proc. Sec. 1365.

Children

Since the acknowledgment of an illegitimate child places him on exactly the same footing as a legitimate one with respect to the estate of the acknowledging father, he also has the right to nominate an administrator to administer the estate. In other words, a child acknowledged in writing by the father, is a "child" within the meaning of this section and 91-1405. In *re Wehr's Estate*, 96 M 245, 249 et seq., 29 P 2d 836.

Legally Competent Persons

The executor of the estate of his deceased first wife remarried; he died before the administration of the estate was completed. His second wife and a brother of the first wife petitioned for letters of administration of the estate. There were debts due from the estate and no account had ever been filed by the executor, to whom the property of his first wife had been left, and who had transferred all his interest in the estate to his second wife. Held, that under the facts both applicants were "legally competent persons" within subdivision 10 of this section, and that the court in appointing the male applicant in preference to the female (Sec. 91-1402) did not abuse the discretion lodged in it under section 91-1403. In *re Kern's Estate*, 96 M 443, 31 P 2d 313.

No Provision for Selection of Intestate's Nominee

Held, that under this section, providing the exclusive method for selection of administrators of estates of intestates, specifying selection in the order named, there is no provision for the selection of a nominee or appointee of the intestate, and that therefore, the public administrator, falling in class 8 (after relatives and next of kin), was entitled to letters where one died intestate, leaving no relatives in this country, and instead of leaving a will, had executed an instrument "appointing" an administrator. In *re Rohkramer's Estate*, 113 M 545, 547, 131 P 2d 967.

Partner Cannot be Administrator

The law does not favor the administration of estates by a person under conditions likely to result in a conflict of interests in the performance of his duty, as where he administers the estates of two partners and at the same time carries on the partnership business virtually as a surviving partner, and in the meantime fails to ascertain the rights of the estates in the business or make reports required by statute; in such circumstances he is

incompetent to serve, as a legal proposition, under this section. In *re Rinio's Estate*, 93 M 428, 435, 19 P 2d 322.

Preference as to Special Administrator

Where a will, valid on its face, names an executor and it becomes necessary to appoint a special administrator of the estate, preference should be given to the person named as executor, and where an executor is not named in the will, the court should give like preference to the person entitled to letters of administration. *State ex rel. McKennan v. District Court*, 69 M 340, 344, 222 P 426.

Preference Right of Nonresident Son to Nominate Over Resident Daughter

A decedent with estate in Montana left surviving her five children, two sons and two daughters resident in a foreign country and a daughter residing in Montana. Over the objections of the resident daughter who prayed for letters in her own behalf, the court appointed a resident nominee of the foreign heirs. Held, under this section, sections 91-1402 and 91-1405, that the action of the court was correct, the nominee of the sons being entitled to preference over their resident sister, and the court having been without discretion to do otherwise. In *re Estate of Welscher*, 77 M 164, 166 et seq., 250 P 447.

Qualifications of the Appointee by Surviving Husband or Wife

No condition or limitation is imposed upon the widow's choice of an administrator, except that the nominee be competent; and the fact that she asserts claim to property which the other heirs contend belong to the estate does not render her or her nominee incompetent. In *re Blackburn's Estate*, 48 M 179, 188, 137 P 381.

The mere fact that a person nominated be decedent's widow as administrator with the will annexed asserts adverse interests against and makes claims upon the estate does not render him incompetent to serve. In *re McLure's Estate*, 63 M 536, 539, 542, 208 P 900.

Respective Rights May be Irrevocably Waived

The prior right conferred by this section upon those most interested in an intestate's estate to administer it may be waived; and if waived in favor of another, the renunciation, if fairly procured and freely made, is irrevocable. In *re Blackburn's Estate*, 48 M 179, 188, 137 P 381. See also *In re Dolenty's Estate*, 53 M 33, 49, 161 P 524.

Right in General

The surviving husband or wife is en-

titled to letters of administration to the exclusion of any other person unless one of the grounds of incompetency enumerated in section 91-1405 is shown to exist. *State ex rel. Cotter v. District Court*, 49 M 146, 148, 140 P 732.

Under this section, the surviving wife of a decedent is *prima facie* entitled to have letters of administration issued to her or some competent person designated by her, in preference to the mother of decedent. *State ex rel. Peel v. District Court*, 59 M 505, 514, 197 P 741.

Under this section, relatives of a decedent are entitled to administer only when they are entitled to succeed to his personal estate or some portion thereof. The widow under the will was "endowed in his estate, real and personal." In a proceeding seeking to debar the widow from nominating an administrator with the will annexed, held that the testator by the use of the word "endowed" did not intend that she should be limited to her right of dower—a third part of his real property—but did intend that she should have the same portion of his estate, both real and personal, to which she would have been entitled had he died intestate. In *re McLure's Estate*, 63 M 536, 539, 542, 208 P 900.

Section 91-1401 simply recognizes the right of those having the preponderance of interest in the estate of one dying intestate to administer the estate. (Compare *In re Cameron's Estate*, 86 M 455, 284 P 143.) In *re Wehr's Estate*, 96 M 245, 249 et seq., 29 P 2d 836.

Right of a Relative Other Than Husband or Wife to Appoint is Addressed to the Discretion of the Court

The right of a surviving husband or wife to administer or to name the administrator is absolute, but a request by any other relative named in section 91-1601, is addressed to the sound discretion of the court. *Melzner v. Trucano*, 51 M 18, 24, 149 P 365.

The request made by children of a decedent for the appointment of an administrator other than the one nominated by the widow was addressed to the sound discretion of the court, the exercise of which will not be disturbed on appeal unless a clear abuse thereof is shown. In *re McLure's Estate*, 63 M 536, 539, 542, 208 P 900.

Right of Nonresident Relative to Appoint an Administrator Whose Right is Prior to Public Administrator

The district court properly denied the request of a public administrator for letters of administration, and did not commit error in granting such letters to a resident

of the state, whose appointment as administrator had been asked by decedent's nonresident brothers and sisters, the law contemplating that those most interested in the administration of the estate, though nonresidents, shall have the right to nominate some person whom they may deem trustworthy to act in that capacity for them. In *re Watson's Estate*, 31 M 438, 439, 78 P 702.

Right of Wife or Husband to Nominate Party to Act Not Lost by Reason of Minority

A statute providing that letters of administration must be granted, first, to the surviving husband or wife, "or some competent person whom he or she may request to have appointed," preserves to a widow, who is disqualified by reason of minority, the right to nominate a person legally qualified to apply for letters of administration, and such person is entitled to be appointed in preference to the public administrator. In *re Stewart's Estate*, 18 M 595, 597, 46 P 806.

Right to Nominate Not Affected by Incompetency of Widow

The widow, whether competent or not, still has her right of nomination. In *re Blackburn's Estate*, 48 M 179, 195, 137 P 381.

Right to Nominate Not Affected by Withdrawal of Petition for Letters

Withdrawal of her petition for letters of administration, a counter-petition to which had been filed, did not deprive the widow of the decedent of her right, before hearing on the petitions, to nominate a suitable person to act for her as administrator. *State ex rel. Peel v. District Court*, 59 M 505, 514, 197 P 741.

Id. While ordinarily mandamus does not lie to correct an error of the district court, yet where its erroneous action was tantamount to refusal to act—as where, on motion, it struck a petition for letters of administration from the files without affording an opportunity to petitioner to be heard on the merits, a duty specially enjoined upon it by law—mandamus is the proper remedy to compel restoration of the petition to the files.

When Court May Properly Deny Letters to One Having Superior Right Thereto

Where letters of administration had been issued to one whose right thereto was inferior to that of petitioner for their revocation (nominee of the widow of decedent), who asked for their revocation and that letters be issued to him, but the estate amounted to but \$1,943 and was ready for distribution, the court was justi-

fied in denying the petition. In re Esterly's Estate, 97 M 206, 208, 34 P 2d 539.

References

In re Cameron's Estate, 86 M 455, 460 et seq., 284 P 143; In re Rinio's Estate, 96 M 344, 346, 30 P 2d 803; In re Hoermann's Estate, 108 M 386, 388, 91 P 2d 394; In re Mapes' Estate, 112 M 549, 552, 118 P 2d 755.

Executors and Administrators—17.

33 C.J.S. Executors and Administrators §§ 34, 44.

Selection of administrator from among members of class equally entitled. 1 ALR 1245.

Right in appointment of administrator to pass over eligible person interested in estate and appoint a stranger. 80 ALR 824.

Construction and application of statute authorizing the appointment of trust company as guardian, trustee, or administrator upon application or consent of one acting as such (or as executor), or one entitled to appointment as such. 105 ALR 1199.

91-1402. (10069) Preference of persons equally entitled. Of several persons claiming and equally entitled to administer, males must be preferred to females, and relatives of the whole to those of the half blood.

History: En. Sec. 56, p. 253, L. 1877; re-en. Sec. 56, 2nd Div. Rev. Stat. 1879; re-en. Sec. 56, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2431, C. Civ. Proc. 1895; re-en. Sec. 7433, Rev. C. 1907; re-en. Sec. 10069, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1366.

Operation and Effect

A decedent with estate in Montana left surviving her five children, two sons and two daughters resident in a foreign country and a daughter residing in Montana. Over the objections of the resident daughter who prayed for letters in her own behalf, the court appointed a resident nominee of the foreign heirs. Held, under this section and the preceding one, and sec. 91-1405, that the action of the court was correct, the nominee of the sons being entitled to preference over their resident sister, and the court having been without discretion to do otherwise. In re Estate of Welscher, 77 M 164, 168, 250 P 447.

The executor of the estate of his de-

ceased first wife remarried; he died before the administration of the estate was completed. His second wife and a brother of the first wife petitioned for letters of administration of the estate. There were debts due from the estate and no account had ever been filed by the executor, to whom the property of his first wife had been left, and who had transferred all his interest in the estate to his second wife. Held, that under the facts both applicants were "legally competent persons" within subdivision 10 of sec. 91-1401, and that the court in appointing the male applicant in preference to the female (this section) did not abuse the discretion lodged in it under sec. 91-1403. In re Kern's Estate, 96 M 443, 449, 31 P 2d 313.

Choice in appointment of administrator as between nominee of one in higher court of statutory preference and one in lower order of preference. 113 ALR 780.

Appointment as administrator of one a member or nominee of a member of the class of persons designated by statute as eligible to appointment, where no one in better right has applied. 119 ALR 143.

Creditor's or debtor's right to attack issuance of letters of administration. 123 ALR 1225.

Scope and effect of waiver or renunciation of right to administer decedent's estate. 153 ALR 220.

Propriety of appointing or refusing to appoint as executor or administrator one who had become an executor de son tort. 157 ALR 237.

Physical condition as affecting competency to act as executor or administrator. 158 ALR 296.

Right of minor next of kin to apply through next friend for appointment of administrator. 161 ALR 1389.

Executors and Administrators—17 (5).

33 C.J.S. Executors and Administrators §§ 32, 34, 36.

91-1403. (10070) In discretion of court or judge to appoint administrator, when. When there are several persons equally entitled to the administration, the court or judge may grant letters to one or more of them.

History: En. Sec. 57, p. 254, L. 1877; re-en. Sec. 57, 2nd Div. Rev. Stat. 1879; re-en. Sec. 57, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2432, C. Civ. Proc. 1895; re-en. Sec. 7434, Rev. C. 1907; re-en. Sec. 10070, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1367.

Operation and Effect

The executor of the estate of his deceased first wife remarried; he died before the administration of the estate was completed. His second wife and a brother of the first wife petitioned for letters of

administration of the estate. There were debts due from the estate and no account had ever been filed by the executor, to whom the property of his first wife had been left, and who had transferred all his interest in the estate to his second wife. Held, that under the facts both applicants

were "legally competent persons" within subdivision 10 of sec. 91-1401, and that the court in appointing the male applicant in preference to the female (sec. 91-1402) did not abuse the discretion lodged in it under this section. In re Kern's Estate, 96 M 443, 449, 31 P 2d 313.

91-1404. (10071) When minor entitled, who appointed administrator.

If any person entitled to administration is a minor, letters must be granted to his or her guardian, or any other person entitled to letters of administration, in the discretion of the court or judge.

History: En. Sec. 58, p. 254, L. 1877; re-en. Sec. 58, 2nd Div. Rev. Stat. 1879; re-en. Sec. 58, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2433, C. Civ. Proc. 1895; re-en. Sec. 7435, Rev. C. 1907; re-en. Sec. 10071, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1368.

Operation and Effect

This section has application to minors generally other than to a surviving husband or wife under the age of majority,

yet old enough to lawfully contract the marital relation. As to minors sustaining such relationship, the statute giving the right to nominate is special and controls. In re Stewart's Estate, 18 M 595, 599, 46 P 806.

Executors and Administrators—17 (1, 4).

33 C.J.S. Executors and Administrators §§ 32-34, 37, 38, 39, 42, 45.

91-1405. (10072) Who are incompetent to act as administrators. No person is competent or entitled to serve as administrator or administratrix who is:

1. Under the age of majority.

2. Not a bona fide resident of the state; but if a person otherwise entitled to serve is not a resident of the state, and either the husband, wife, or child, or parent, or brother, or sister of the deceased, he may request the court or judge to appoint a resident of the state to serve as administrator, and such person may be appointed, but no other nonresident than a surviving husband, wife, or child, or parent, or brother, or sister shall have such right to request an appointment, and the court or judge must order letters issued to the applicant entitled thereto under the provisions of this chapter.

3. Convicted of an infamous crime.

4. Adjudged by the court incompetent to execute the duties of the trust by reason of drunkenness, improvidence, or want of understanding or integrity.

History: En. Sec. 59, p. 254, L. 1877; re-en. Sec. 59, 2nd Div. Rev. Stat. 1879; re-en. Sec. 59, 2nd Div. Comp. Stat. 1887; amd. Sec. 2434, C. Civ. Proc. 1895; amd. Sec. 1, p. 137, L. 1899; re-en. Sec. 7436, Rev. C. 1907; re-en. Sec. 10072, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1369.

Assertion of Claim to Property Does Not Render One Incompetent

An assertion of claim to property which the other heirs contend belongs to the estate does not render the widow or her nominee incompetent to administer it. In re Blackburn's Estate, 48 M 179, 188, 137 P 381; In re Dolenty's Estate, 53 M 33, 46, 161 P 524.

The mere fact that a person nominated by decedent's widow as administrator with the will annexed asserts adverse interests against and makes claims upon the estate does not render him incompetent to serve. In re McLure's Estate, 63 M 536, 543, 208 P 900.

The fact that the brother of decedent, who nominated his son to act as administrator of the estate of the intestate had a claim against the estate, did not render the father incompetent to make the nomination, nor the son from serving; the appointment or rejection of the nominee in such circumstances resting in the sound discretion of the court, its action in this behalf being reversible only in case of a

clear abuse of discretion. In re Rinio's Estate, 96 M 344, 346, 30 P 2d 803.

"Bona Fide Resident of the State"

Held, that evidence that the nonresident sister of a decedent moved to Montana for the purpose of petitioning for letters of administration and with the intention of remaining, was sufficient to establish the fact of her residence in the state, in the absence of any declarations or actions showing a contrary intent and in view of the fact that she had no permanent residence anywhere else, and that she therefore was at the time of making petition for letters, about a month after her arrival in the state, a bona fide resident within the meaning of this section, requiring an administrator to be a bona fide resident of the state. In re Estate of Nix, 66 M 559, 565, 213 P 1089.

Under this section, one not a bona fide resident of Montana is disqualified from serving as administrator. In re Myer's Estate, 92 M 474, 476 et seq., 15 P 2d 846.

Id. Evidence in a proceeding to procure letters of administration by one who up to a week before the death of the intestate, his uncle, was a resident of another state, to the effect that he intended making Montana his home because of the state of his health, that he intended purchasing a farm if a suitable one could be found, that he intended thereafter to vote here, etc., held of sufficient substance to justify a finding by the trial court that petitioner on the date of filing the petition was a bona fide resident of the state.

"Drunkenness"

Unless the drunkenness charged as a disqualification is due to the excessive, inveterate, and continued use of intoxicants to such an extent that the applicant would be an unsafe agent, letters of administration will not be denied. Root v. Davis, 10 M 228, 243, 25 P 105.

General Business Experience and Knowledge of Bookkeeping Not Necessary Qualifications

Where the trial court in granting letters of administration found that the petitioner, twenty-four years of age, was possessed of more than ordinary intelligence, it did not err in overruling objections of creditors of the estate on the ground of want of understanding because of lack of sufficient business experience and knowledge of bookkeeping, such qualifications not being required to warrant appointment in the case. In re Rinio's Estate, 96 M 344, 346, 30 P 2d 803.

"Improvvidence"

The facts that an applicant does not possess property of considerable value at

an age of 65 and has not supported his wife and children for a number of years, from whom he has been separated, do not constitute improvidence, and unless there is evidence of the applicant's indifference, carelessness, prodigality, wastefulness, or negligence in the management of property letters will not be denied. Root v. Davis, 10 M 228, 243, 25 P 105.

Preference Right of Nonresident Son to Nominate Over Resident Daughter

A decedent with estate in Montana left surviving her five children, two sons and two daughters resident in a foreign country and a daughter residing in Montana. Over the objections of the resident daughter who prayed for letters in her own behalf, the court appointed a resident nominee of the foreign heirs. Held, under secs. 91-1401 and 91-1402, and this section, that the action of the court was correct, the nominee of the sons being entitled to preference over their resident sister, and the court having been without discretion to do otherwise. In re Estate of Welscher, 77 M 164, 166 et seq., 250 P 447.

Request of Nonresident Heir for Appointment of a Resident Administrator Addressed to the Discretion of the Court

In the absence of statute giving a resident child of a decedent a preference of administration over the resident nominee of a nonresident child, a request preferred by a nonresident under subdivision 2 of this section, for the appointment of a resident administrator is addressed to the judicial discretion of the court. In re Cameron's Estate, 86 M 455, 460 et seq., 284 P 143.

Id. Under the above rule, held, that, where the court had before it two petitions for letters of administration with the will annexed, one filed by a resident daughter of decedent, and one by the resident nominee of three nonresident daughters, it was not mandatory upon it to appoint the resident heir and its action in appointing the nominee of the three nonresidents with whom lay the preponderance of interest in the estate, may not be held an abuse of its discretion in the premises. (Honorable C. W. Pomeroy, District Judge, sitting in place of Mr. Justice Galen, dissenting.)

Right of Foreign Illegitimate Son Acknowledged by Decedent to Nominate Administrator

The evidence held sufficient not only to establish the right of the illegitimate son to inherit his father's estate, but also sufficient to entitle him, as a nonresident and as the decedent's "child," to nominate an administrator of his father's estate

under this section. In *re Wehr's Estate*, 96 M 245, 249 et seq., 29 P 2d 836.

Right of Nonresident Heir to Nominate

Under this section, a person who is incompetent to serve as administrator by reason of nonresidence may, if he or she fall within one of the five favored classes therein enumerated, nominate a resident to serve, the right to nominate being absolute as to all the five classes enumerated in the section, in the order of their priority. In *re Estate of Welscher*, 77 M 164, 166 et seq., 250 P 447.

"Want of Integrity"

Want of integrity in the applicant, based upon the ground that he had testified falsely on a former occasion, is not supported by proof that three years before, when summoned for jury service, applicant had testified that he was a citizen of another state, and that in the trial of the case at bar he had testified that he had been a resident of this state for five years, where it clearly appeared that in giving such testimony he made a distinction between residence and citizenship. *Root v. Davis*, 10 M 228, 248, 25 P 105.

The fact that the son of the deceased may have had a claim adverse to the estate did not, of itself, render him incompetent to act as administrator. In *re Graff's Estate*, — M —, 174 P 2d 216, 217.

"Want of Understanding"

A charge of disqualification through want of understanding cannot be supported

in the absence of evidence, and where such charge is incompatible with another charge affecting the integrity of the applicant, as an alleged design on the part of applicant to defraud certain heirs, and of a conspiracy to carry out such fraudulent purpose. *Root v. Davis*, 10 M 228, 247, 25 P 105.

The court properly removed an executor who was palpably deficient in the understanding necessary to enable one to transact business, who made no sufficient effort to collect the debts due the estate, who never read and did not know the contents of affidavits attached to his report, who was ignorant of his personal business relations with the decedent whose estate he was administering, and who, in short, was incompetent because incapable. In *re Courtney's Estate*, 31 M 625, 628, 79 P 317.

References

Cited or applied as sec. 2434, Code of Civil Procedure, before amendment, in *In re Craigie's Estate*, 24 M 37, 44, 60 P 495; as amended, in *In re Watson's Estate*, 31 M 438, 439, 78 P 702; as section 7436, Revised Codes, in *State ex rel. Cotter v. District Court*, 49 M 146, 148, 140 P 732.

Executors and Administrators—18.

33 C.J.S. Executors and Administrators § 46.

21 Am. Jur. 419-428, Executors and Administrators, §§ 82-95.

Right of minor next of kin to apply through next friend for appointment of administrator. 161 ALR 1389.

91-1406. (10073) Married woman may be administratrix. A married woman may be appointed administratrix. When an unmarried woman marries, her authority continues.

History: Ap. p. Sec. 60, 2nd Div. Comp. Stat. 1887; en. Sec. 2435, C. Civ. Proc. 1895; re-en. Sec. 7437, Rev. C. 1907; re-en. Sec. 10073, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1370.

Cross-Reference

Right of married woman to be administratrix, sec. 36-127.

Executors and Administrators—15.

33 C.J.S. Executors and Administrators § 28.

CHAPTER 15

PETITION FOR LETTERS OF ADMINISTRATION AND ACTION THEREON

- Section 91-1501. Application—how made.
 91-1502. When granted.
 91-1503. Notice of application.
 91-1504. Contesting application.
 91-1505. Hearing of application.
 91-1506. Evidence of notice.
 91-1507. Grant to any applicant.
 91-1508. What proof must be made before granting letters of administration.
 91-1509. Letters may be granted to others than those entitled.

91-1501. (10074) Application—how made. Petitions for letters of administration must be in writing, signed by the applicant or his attorney, and filed with the clerk of the court, stating the facts essential to give jurisdiction of the case, and when known to the applicant, he must state the names, ages, and residence of the heirs of the decedent, and the value and character of the property. If the jurisdictional facts existed, but are not fully set forth in the petition, and are afterward proved in the course of administration, the decree or order of administration and subsequent proceedings are not void on account of such want of jurisdictional averments.

History: En. Sec. 61, p. 254, L. 1877; re-en. Sec. 61, 2nd Div. Rev. Stat. 1879; re-en. Sec. 61, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2440, C. Civ. Proc. 1895; re-en. Sec. 7438, Rev. C. 1907; re-en. Sec. 10074, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1371.

Sufficient Evidence of Insolvency

The showing made by the holder of a mortgage in her petition for the appointment of the administrator, under this sec-

tion, that the property of the estate did not exceed in value the sum of \$1,075, held sufficient evidence that the estate was prima facie insolvent, where a general creditor whose claim amounted to \$22,000 sought to have default judgment against administrator in foreclosure suit set aside as constructively fraudulent for failure of administrator to plead invalidity of mortgage. *Missoula Trust & Savings Bank v. Boos*, 106 M 294, 297, 77 P 2d 385.

91-1502. (10075) When granted. Letters of administration may be granted by the court or judge at any time appointed for the hearing of the application, or at any time to which the hearing is continued or postponed.

History: En. Sec. 62, p. 254, L. 1877; re-en. Sec. 62, 2nd Div. Rev. Stat. 1879; re-en. Sec. 62, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2441, C. Civ. Proc. 1895; re-en. Sec. 7439, Rev. C. 1907; re-en. Sec. 10075, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1372.

Executors and Administrators—20 (9).
33 C.J.S. Executors and Administrators
§ 63.

91-1503. (10076) Notice of application. When a petition praying for letters of administration is filed, the clerk must give notice thereof by causing notices to be posted in at least three public places in the county, one of which must be at the place where the court is held, containing the name of the decedent, the name of the applicant, and the time at which the application will be heard. Such notice must be given at least ten days before the hearing.

History: En. Sec. 63, p. 254, L. 1877; re-en. Sec. 63, 2nd Div. Rev. Stat. 1879; re-en. Sec. 63, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2442, C. Civ. Proc. 1895; re-en. Sec. 7440, Rev. C. 1907; re-en. Sec. 10076, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1373.

Alleged Approval by Deposed Administrator of Appointment of Successor Insufficient to Dispose of Statutory Requirements

Upon application for writ to set aside orders of sale of cattle and transfer of brand procured by the new administrator after removal of relator, an alien and citizen of Rumania as administrator of his brother's \$100,000 estate, on the ground that his successor had been appointed without petition, notice and hearing, held, as against the contention that relator in con-

versations with the judge and others had consented to the appointment, that relator had no authority after being removed to speak for other heirs regardless of rule that entry by consent may be shown by extrinsic evidence. *State ex rel. Gaspar v. District Court*, 113 M 318, 323, 124 P 2d 1010.

Appointment with Consent of All Interested Parties

If a general administrator may ever be appointed without taking the statutory steps, it certainly may not be done when all interested parties have not consented thereto. *State ex rel. Gaspar v. District Court*, 113 M 318, 323, 124 P 2d 1010.

Computation of Time

The rule declared by sec. 90-407, that

the time within which the law requires an act to be done shall be computed by excluding the first and including the last day, applies to the provision of this section, that notice of application for letters of administration must be posted at least ten days before the hearing—an event; it has no application where the thing is required to be done a certain number of days

before a given date. In *re Esterly's Estate*, 97 M 206, 210, 34 P 2d 539.

Id. Under the above rule, held, that where a notice of application for letters of administration was posted on December 21 fixing the hearing at 10 o'clock a. m. on December 31, the day of hearing—an event as distinguished from a certain day—it was sufficient to give the court jurisdiction, and the letters issued were valid.

91-1504. (10077) Contesting application. Any person interested may contest the petition, by filing written opposition thereto, on the ground of the incompetency of the applicant, or may assert his rights to the administration, and pray that letters be issued to him. In the latter case the contestant must file a petition and give the notice required for an original petition, and the court or judge must hear the two petitions together.

History: En. Sec. 64, p. 254, L. 1877; re-en. Sec. 64, 2nd Div. Rev. Stat. 1879; re-en. Sec. 64, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2443, C. Civ. Proc. 1895; re-en. Sec. 7441, Rev. C. 1907; re-en. Sec. 10077, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1374.

Answer to Objections Need Not be Filed

Under this and the following section, providing that where a petition for letters of administration is contested, the contesting application and the petition must be set for hearing and heard together, it seems clear that no pleading in the nature of an answer to the objections filed is required; hence, where no answer was filed, the court did not err in striking a praecipe for default filed and default entered. In *re Mapes' Estate*, 112 M 549, 555, 118 P 2d 755.

Operation and Effect

In so far as this section does not authorize issues upon pleadings, it negatives the idea of any other character of hearing than a summary one by the court or judge, without any formalities attending the trial of a civil action. In *re Antonioli's Estate*, 42 M 219, 223, 111 P 1033.

Where the district court, sitting in probate, instead of hearing a petition for letters of administration, a counter petition and a motion to strike the original petition from the files, together, as required by this section, simply heard and

granted the motion to strike, its action was without authority of law and void. *State ex rel. Peel v. District Court*, 59 M 505, 515, 197 P 741; *State v. Great Northern Utilities Co.*, 86 M 442, 447, 284 P 772.

Procedure Informal—Petitions Need Not Be Relative

Where a petition for letters was filed by the nominee of decedent (not provided by law) and a counter-petition by the public administrator, both petitions heard together and both parties participating, held, that the procedure on application for letters is largely informal, the only paper serving as a pleading being the petition of the applicant, wherein he states his case as if *ex parte*, and where there is another applicant he does the same, there being no requirement that the petitions be framed in relation of one to the other. In *re Rohkramer's Estate*, 113 M 545, 550, 555, 131 P 2d 967.

References

Cited or applied as sec. 2443, Code of Civil Procedure, in *In re Liter's Estate*, 19 M 474, 477, 48 P 753; *State ex rel. Lancaster v. Woody*, 20 M 413, 417, 51 P 975.

Executors and Administrators—20 (4-8).

33 C.J.S. Executors and Administrators §§ 53, 55-57, 59-62.

91-1505. (10078) Hearing of application. On the hearing, it being first proved that notice has been given, as herein required, the court or judge must hear the allegations and proofs of the parties, and order the issuing of letters of administration to the party best entitled thereto.

History: En. Sec. 65, p. 255, L. 1877; re-en. Sec. 65, 2nd Div. Rev. Stat. 1879; re-en. Sec. 65, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2444, C. Civ. Proc. 1895; re-en.

Sec. 7442, Rev. C. 1907; re-en. Sec. 10078, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1375.

References

Cited or applied as sec. 2444, Code of

Civil Procedure, in *In re Liter's Estate*, 19 M 474, 477, 48 P 753; *State ex rel. Peel v. District Court*, 59 M 505, 517, 197 P 741;

State ex rel. McCabe v. District Court, 106 M 272, 279, 76 P 2d 634; *In re Mapes' Estate*, 112 M 549, 555, 118 P 2d 755.

91-1506. (10079) Evidence of notice. An entry in the minutes of the court, that the required proof was made and notice given, shall be conclusive evidence of the fact of such notice.

History: En. Sec. 66, p. 255, L. 1877; re-en. Sec. 66, 2nd Div. Rev. Stat. 1879; re-en. Sec. 66, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2445, C. Civ. Proc. 1895; re-en. Sec. 7443, Rev. C. 1907; re-en. Sec. 10079, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1376.

91-1507. (10080) Grant to any applicant. Letters of administration must be granted to any applicant, though it appears that there are other persons having better rights to the administration, when such persons fail to appear and claim the issuing of letters to themselves.

History: En. Sec. 67, p. 255, L. 1877; re-en. Sec. 67, 2nd Div. Rev. Stat. 1879; re-en. Sec. 67, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2446, C. Civ. Proc. 1895; re-en. Sec. 7444, Rev. C. 1907; re-en. Sec. 10080, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1377.

sister of the intestate may obtain the revocation of such letters for the reason that he or she is better entitled to them. *In re Craigie's Estate*, 24 M 37, 44, 60 P 495.

References

Cited or applied as sec. 2446, Code of Civil Procedure, in *In re Liter's Estate*, 19 M 474, 478, 48 P 753; *State ex rel. Lancaster v. Woody*, 20 M 413, 417, 51 P 975; as sec. 7444; Revised Codes, in *In re Blackburn's Estate*, 48 M 179, 187, 137 P 381.

Operation and Effect

Unless a person is a bona fide resident of the state, he is not competent to serve as administrator; and, after letters have been granted to a competent applicant, no person other than the surviving husband or wife, child, father, mother, brother, or

91-1508. (10081) What proof must be made before granting letters of administration. Before letters of administration are granted on the estate of any person who is represented to have died intestate, the fact of his dying intestate must be proved by the testimony of the applicant or others; and the court or judge may also examine any other person concerning the time, place, and manner of his death, the place of his residence at the time, the value and character of his property, and whether or not the decedent left any will, and may compel any person to attend as a witness for that purpose.

History: En. Sec. 68, p. 255, L. 1877; re-en. Sec. 68, 2nd Div. Rev. Stat. 1879; re-en. Sec. 68, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2447, C. Civ. Proc. 1895; re-en. Sec. 7445, Rev. C. 1907; re-en. Sec. 10081, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1378.

Operation and Effect

Where an alleged will of a decedent is before the court for probate, and a contest pending thereon, it is proper for the court, taking judicial notice of its own proceedings, to refuse to vacate an order for the appointment of a general administrator theretofore made, and to grant general letters of administration to another person upon a petition made for such purposes, as such petition would involve proof of the intestacy of the decedent in advance of the determination of that question by the trial of the contest upon the probate of the will. *In re Davis-Cummings' Appeal*, 11 M 196, 211, 213, 28 P 645.

Id. The making of an order for the appointment of a general administrator is not an adjudication of the intestacy of the decedent, binding upon the court until set aside, but a will may be propounded at any time, and its admission to probate ipso facto vacates letters of general administration.

Proof of the intestacy and death must be made, the purpose of which is to ascertain what condition of facts exists. Questions must be answered though no actual issues of fact are involved, and the district court acts simply in behalf of all persons interested in the administration of the estate, and does so in a somewhat ministerial as well as judicial capacity. *In re Liter's Estate*, 19 M 474, 478, 48 P 753.

Executors and Administrators—20 (8).
33 C.J.S. Executors and Administrators
§§ 59, 61, 62.

91-1509. (10082) Letters may be granted to others than those entitled. Administration may be granted to one or more competent persons, although not otherwise entitled to the same, at the written request of the person entitled, filed in the court. When the person entitled is a non-resident of the state, affidavits, taken ex parte before any officer authorized by the laws of this state to take acknowledgments and administer oaths out of this state, may be received as prima facie evidence of the identity of the party, if free from suspicion, and the fact is established to the satisfaction of the court.

History: Ap. p. Sec. 69, p. 256, L. 1877; re-en. Sec. 69, 2nd Div. Rev. Stat. 1879; re-en. Sec. 69, 2nd Div. Comp. Stat. 1887; en. Sec. 2448, C. Civ. Proc. 1895; re-en. Sec. 7446, Rev. C. 1907; re-en. Sec. 10082, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1379.

Affidavit Not Exclusive Method of Identification

The method for proving identity of a nonresident appointing someone to act as administrator of an estate, prescribed by this section, i.e., that an affidavit may be received as prima facie evidence of the identity of that person, is not the exclusive method for such proof; held, that where there is sufficient evidence by oral testimony to establish the identity of the signer, and under sec. 93-1101-19, of the execution of the instrument, an acknowledged instrument is admissible in evidence. In re Mapes' Estate, 112 M 549, 554, 118 P 2d 755.

Operation and Effect

If a decedent's mother, residing in a foreign country, makes a written request for the appointment of a designated person as administrator of her son's estate in

this state, and the same is entitled in the court and cause and addressed to the judge of the court, and is accompanied by an affidavit as to the identity of the party making the request, executed before an officer authorized to administer oaths outside of the United States, such request virtually constitutes a pleading, and, as the request and affidavit are a part of the record in the case, and thus before the court, it is unnecessary to formally offer them in evidence. In re Koller's Estate, 40 M 137, 142, 105 P 549.

Under this section, a request for the revocation of letters of administration by one of the persons named in sec. 91-1601, must be filed in the district court, and a petition failing to allege the filing of such request is insufficient. Melzner v. Trucano, 51 M 18, 23, 149 P 365.

References

In re Rinio's Estate, 96 M 344, 346, 30 P 2d 803; In re Hoermann's Estate, 108 M 386, 388, 91 P 2d 394.

Executors and Administrators—17 (7).
33 C.J.S. Executors and Administrators
§§ 34, 44.

CHAPTER 16

PROCEEDINGS FOR REVOCATION OF LETTERS OF ADMINISTRATION

- Section 91-1601. Revocation of letters of administration.
91-1602. When petition filed, citation to issue.
91-1603. Hearing of petition for revocation.
91-1604. Prior right of relatives entitles them to revoke prior letters.

91-1601. (10083) Revocation of letters of administration. When letters of administration have been granted to any other person than the surviving husband or wife, child, father, mother, brother, or sister of the intestate, any one of them who is competent, or any competent person at the written request of any one of them, may obtain the revocation of the letters, and be entitled to the administration, by presenting to the court a petition praying the revocation, and that letters of administration be issued to him.

History: En. Sec. 70, p. 256, L. 1877; re-en. Sec. 70, 2nd Div. Rev. Stat. 1879; re-en. Sec. 70, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2460, C. Civ. Proc. 1895; re-en. Sec. 7447, Rev. C. 1907; re-en. Sec. 10083, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1383.

Operation and Effect

Where letters of administration have been granted to any person, other than those enumerated in this section, any one of the persons therein named, though a resident of a foreign country, may seek the revocation of such letters and nominate someone to act as administrator. *Melzner v. Trucano*, 51 M 18, 23, 149 P 365.

Id. This section, under which the nominee of a surviving mother may be entitled to letters and to the revocation of prior letters, is not absolute and available at all times, under all conditions. The pleading in such, as in all other cases, must show *prima facie* that the applicant is entitled to the relief sought.

Id. The right conferred by this section to name a person to administer the estate of a decedent may be waived by refusal or failure to claim the privilege, or by unreasonable delay in claiming it.

The right of petitioning for the revocation of letters of administration given by this section, if granted to one other than the persons named therein, is not absolute and available at all times, under all conditions, but, under it, where one of an inferior class obtains letters, one of a superior class may, the conditions being favorable, invoke and secure its benefit. *In re Cameron's Estate*, 86 M 455, 462, 284 P 143.

When Court May Dispense With These Provisions

Under sec. 91-2406, the district court sitting in probate may, after the issuance of letters of administration, dispense with the regular proceedings in estate matters prescribed by secs. 91-701 to 91-5211 of

the Codes, where an estate does not exceed the sum of \$3,000, and hence may in such a case in its discretion dispense with all the provisions of secs. 91-1601 to 91-1604, relating to revocation of letters. *In re Esterly's Estate*, 97 M 206, 210, 34 P 2d 539.

References

Cited or applied as sec. 2460, Code of Civil Procedure, in *In re Craigie's Estate*, 24 M 37, 44, 60 P 495; as sec. 7447, Revised Codes, in *re Koller's Estate*, 40 M 137, 141, 105 P 549; *In re Blackburn's Estate*, 48 M 179, 187, 137 P 381; *State ex rel. Stimatz v. District Court*, 105 M 510, 515, 74 P 2d 8.

Executors and Administrators 32 (1).
33 C.J.S. Executors and Administrators § 86; 34 C.J.S. Executors and Administrators § 1038.

21 Am. Jur. 455, Executors and Administrators, §§ 141 et seq.

Status and acts of one appointed executor or administrator who was ineligible. 14 ALR 619.

Allowance for expenses and disbursements by executor or administrator after revocation of his letters. 31 ALR 846.

Effect of proceedings to supplant administrator or executor, or of appeal from order appointing or removing him, upon right of person who dealt with him pending such proceeding or appeal. 99 ALR 862.

Personal interest of executor or administrator adverse to or conflicting with those of other persons interested in estate as grounds for revocation of letters or removal. 119 ALR 306.

91-1602. (10084) When petition filed, citation to issue. When such petition is filed, the clerk must, in addition to the notice provided in section 91-1503, issue a citation to the administrator to appear and answer the same at the time appointed for the hearing.

History: En. Sec. 71, p. 256, L. 1877; re-en. Sec. 71, 2nd Div. Rev. Stat. 1879; re-en. Sec. 71, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2461, C. Civ. Proc. 1895; re-en. Sec. 7448, Rev. C. 1907; re-en. Sec. 10084, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1384.

References

Cited or applied as sec. 7448, Revised

Codes, in *In re Blackburn's Estate*, 48 M 179, 187, 137 P 381.

Executors and Administrators 32 (2).
33 C.J.S. Executors and Administrators §§ 85, 87, 88; 34 C.J.S. Executors and Administrators § 1038.

91-1603. (10085) Hearing of petition for revocation. At the time appointed, the citation having been duly served and returned, the court or judge must proceed to hear the allegations and proofs of the parties; and if the right of the applicant is established, and he is competent, letters of administration must be granted to him, and the letters of the former administrator revoked.

History: En. Sec. 72, p. 256, L. 1877; re-en. Sec. 72, 2nd Div. Rev. Stat. 1879; re-en. Sec. 72, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2462, C. Civ. Proc. 1895; re-en. Sec. 7449, Rev. C. 1907; re-en. Sec. 10085, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1385.

References

Cited or applied as sec. 7449, Revised Codes, in *In re Blackburn's Estate*, 48 M 179, 187, 137 P 381.

91-1604. (10086) Prior right of relatives entitles them to revoke prior letters. The surviving husband or wife, when letters of administration have been granted to a child, father, brother, or sister of the intestate; or any of such relatives, when letters have been granted to any other of them, may assert his prior right, and obtain letters of administration, and have letters before granted revoked in the same manner prescribed in the three preceding sections.

History: En. Sec. 73, p. 256, L. 1877; re-en. Sec. 73, 2nd Div. Rev. Stat. 1879; re-en. Sec. 73, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2463, C. Civ. Proc. 1895; re-en. Sec. 7450, Rev. C. 1907; re-en. Sec. 10086, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1386.

Operation and Effect

It is the policy of the law that the widow shall control in limine the administration of her late husband's estate. To that end she is authorized to either administer it herself, or to nominate some person in whom she places trust and confidence to administer it for her. In *re Blackburn's Estate*, 48 M 179, 188, 137 P

381; In *re Dolenty's Estate*, 53 M 33, 46, 161 P 524.

Where upon the request of a widow and the renunciation of her right to act as administratrix, which was fairly procured and freely given, another was appointed administrator, she has exercised her prior right, and cannot have such appointee removed and letters issued to her whenever she elects. In *re Blackburn's Estate*, 48 M 179, 187, 137 P 381.

References

Cited or applied as sec. 2463, Code of Civil Procedure, in *In re Craigie's Estate*, 24 M 37, 44, 60 P 495.

CHAPTER 17

OATHS AND BONDS OF EXECUTORS AND ADMINISTRATORS

- Section 91-1701.** Administrator or executor to take oath—letters and bonds to be recorded.
- 91-1702. Bond of administrators and executors, form and requirement of.
- 91-1703. Additional bond—when required.
- 91-1704. Verified petition for reduction of bond in estates.
- 91-1705. Reduction of bond—limitations.
- 91-1706. Liability of former surety.
- 91-1707. Condition of bonds.
- 91-1708. Separate bonds, where more than one administrator.
- 91-1709. Several recoveries may be had on same bond.
- 91-1710. Bonds and justification of sureties on—must be approved.
- 91-1711. Citation and requirements of judge on deficient bond—additional security.
- 91-1712. Right ceases, when.
- 91-1713. When bond may be dispensed with.
- 91-1714. Petition showing failing sureties and asking for further bonds.
- 91-1715. Citation to executor, etc., to show cause against such application.
- 91-1716. Further security may be ordered.
- 91-1717. Neglecting to obey order.
- 91-1718. Suspending powers of executor, etc.
- 91-1719. Further security without application of party in interest.
- 91-1720. Release of sureties.
- 91-1721. New sureties.
- 91-1722. Neglect to give new sureties forfeits letters.
- 91-1723. Cost of procuring bonds.

91-1701. (10087) Administrator or executor to take oath—letters and bonds to be recorded. Before letters testamentary or of administration are

issued to the executor or administrator, he must take and subscribe an oath before some officer authorized to administer oaths, that he will perform, according to law, the duties of executor or administrator, which oath must be attached to the letters. All letters testamentary and of administration issued to, and all bonds executed by, executors and administrators, with the affidavits and certificates thereon, must be forthwith recorded by the clerk of the court having jurisdiction of the estates, in books to be kept by him in his office for that purpose.

History: En. Sec. 74, p. 256, L. 1877; re-en. Sec. 74, 2nd Div. Rev. Stat. 1879; re-en. Sec. 74, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2470, C. Civ. Proc. 1895; re-en. Sec. 7451, Rev. C. 1907; re-en. Sec. 10087, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1387.

Executors and Administrators—25-27.
33 C.J.S. Executors and Administrators
§§ 66, 67, 69; 34 C.J.S. Executors and Administrators §§ 1022, 1033, 1037.
21 Am. Jur. 452, Executors and Administrators, § 134.

91-1702. (10088) Bond of administrators and executors, form and requirement of. Every person to whom letters testamentary or of administration are directed to issue must, before receiving them, execute a bond to the state of Montana, with two or more sufficient sureties or a sufficient surety company, to be approved by the district court, or a judge thereof. In form, the bond must be joint and several, and the penalty must not be less than the value of the personal property and the annual rents and profits of real property belonging to the estate, nor more than twice the value of such personal property and rents and profits; provided that upon written request of all the heirs, devisees or legatees and all being over twenty-one years of age and entitled to all of the estate upon distribution, the court may in its discretion fix the penalty of the bond at any sum less than the value of the personal property and the annual rents and profits of the real property belonging to the estate.

History: En. Sec. 75, p. 257, L. 1877; re-en. Sec. 75, 2nd Div. Rev. Stat. 1879; re-en. Sec. 75, 2nd Div. Comp. Stat. 1887; amd. Sec. 2471, C. Civ. Proc. 1895; re-en. Sec. 7452, Rev. C. 1907; amd. Sec. 1, Ch. 173, L. 1919; re-en. Sec. 10088, R. C. M. 1921; amd. Sec. 1, Ch. 167, L. 1937. Cal. C. Civ. Proc. Sec. 1388.

Operation and Effect

The general bond of an administrator given under this section covers all moneys coming into his hands, whether from sale of real property or otherwise; while the additional bond required by the succeeding section upon sale of real property belonging to the estate is security for his acts in that respect only. *Baker v. Hanson et al.*, 72 M 22, 29, 231 P 902.

Id. Since under the preceding rule, the proceeds of a sale of real property of an estate in the hands of an administrator are secured by both his general bond and the additional one required on such a sale, the sureties on both are equally liable and therefore the contention that liability on the additional bond does not attach until the penalty of the general bond has been exhausted is without merit.

An administrator's general or qualifying bond is liable, so far as accounting for property of the estate is concerned, for that which comes into his hands and that which, in the performance of his duties, he should have reduced to possession but did not. *Swanberg v. National Surety Co.*, 86 M 340, 353, 283 P 761.

Id. The general or qualifying bond of an administrator may in any case be wholly responsible for the proceeds of the sale of real property of his estate, in contemplation of the statutes which form a part of the contract, and even where an additional bond is required on the sale of such property (sec. 91-1703), the qualifying bond is jointly liable with it for the proceeds.

References

Cited or applied as sec. 75, Second Division Compiled Statutes 1887, in *In re Craigie's Estate*, 24 M 37, 40, 60 P 495; *Huges v. Goodale*, 26 M 93, 98, 66 P 702; *In re Smith's Estate*, 60 M 276, 298, 199 P 696.

21 Am. Jur. 452, Executors and Administrators, §§ 135, 136.

Leave of court as a prerequisite to an action on an executor's or administrator's bond. 2 ALR 563.

Bond of executor or administrator as covering debt due from principal to decedent. 8 ALR 84.

Power or discretion of court, after bond of executor, administrator, or testamentary trustee has been given, to dispense, discontinue, or modify bonds. 121 ALR 951.

91-1703. (10089) Additional bond—when required. Except when it is expressly provided in the will that no bond shall be required of the executor, the court or judge must require an additional bond whenever the sale of any real estate belonging to an estate is ordered; but no such additional bond must be required when it satisfactorily appears to the court or judge that the penalty of the bond given before receiving letters or any bond given in place thereof, is equal to twice the value of the personal property remaining in or that will come into the possession of the executor or administrator, including the annual rents, profits, and issues of real estate, and twice the probable amount to be realized on the sale of the real estate ordered to be sold.

History: En. Sec. 76, p. 257, L. 1877; re-en. Sec. 76, 2nd Div. Rev. Stat. 1879; re-en. Sec. 76, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2472, C. Civ. Proc. 1895; re-en. Sec. 7453, Rev. C. 1907; re-en. Sec. 10089, R. C. M. 1921; amd. Sec. 1, Ch. 150, L. 1937. Cal. C. Civ. Proc. Sec. 1389.

Operation and Effect

The general bond of an administrator given under the preceding section covers all moneys coming into his hands, whether from sale of real property or otherwise; while the additional bond required by this section upon sale of real property belonging to the estate is security for his acts in that respect only. *Baker v. Hanson et al.*, 72 M 22, 29, 231 P 902.

Id. The additional bond which may be exacted from an administrator under this section, upon a sale of real property belonging to the estate in his charge, is distinct from the further security which may

be required under secs. 91-1711, 91-1712, and 91-1719, whenever his general bond is deemed insufficient, and, when required, the latter security becomes in contemplation of law a part of his general bond and the sureties become subject to the same measure of liability.

The general or qualifying bond of an administrator may in any case be wholly responsible for the proceeds of the sale of real property of his estate, in contemplation of the statutes which form a part of the contract, and even where an additional bond is required on the sale of such property (this section), the qualifying bond is jointly liable with it for the proceeds. *Swanberg v. National Surety Co.*, 86 M 340, 355, 283 P 761.

References

Cited or applied as sec. 76, Second Division Compiled Statutes 1887, in *Huges v. Goodale*, 26 M 93, 95, 66 P 702.

91-1704. Verified petition for reduction of bond in estates. Any person interested in any estate may by verified petition represent to the court or judge that any bond theretofore given in such estate is for a greater amount than the assets of the estate at the time of such petition justify.

History: En. Sec. 1, Ch. 179, L. 1937.

91-1705. Reduction of bond—limitations. If the court or judge is satisfied from such verified petition or upon evidence introduced at a hearing thereon if such hearing be ordered by the court or judge, then such court or judge may make an order reducing the penalty of such existing bond, as to future acts of such executor or administrator, to an amount not less than the then value of the personal property and annual rents and profits of real estate belonging to the estate.

History: En. Sec. 2, Ch. 179, L. 1937.

91-1706. Liability of former surety. If any order be made reducing the penalty of a bond the former surety shall remain liable for future acts, in

the reduced amount, unless such executor or administrator give a new bond in the reduced amount. But on the approval by a court or judge of a new bond in the reduced amount the surety on the former bond shall not be liable for any subsequent act, default, or misconduct of the executor or administrator.

History: En. Sec. 3, Ch. 179, L. 1937.

91-1707. (10090) Condition of bonds. The bond must be conditioned that the executor or administrator shall faithfully execute the duties of the trust according to law.

History: En. Sec. 77, p. 257, L. 1877; re-en. Sec. 77, 2nd Div. Rev. Stat. 1879; re-en. Sec. 77, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2473, C. Civ. Proc. 1895; re-en. Sec. 7454, Rev. C. 1907; re-en. Sec. 10090, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1390.

Operation and Effect

The liability of a paid surety on an official bond of an administrator is measured by his covenant, the conditions of and the statutes relating to the bond and the duties of the administrator; its contract in that behalf is subject to the same rules of construction as any other contract, for the purpose of giving effect to the intention

of the parties. *Swanberg v. National Surety Co.*, 86 M 340, 353, 283 P 761.

Id. An administrator's general or qualifying bond is liable, so far as accounting for property of the estate is concerned, for that which comes into his hands and that which, in the performance of his duties, he should have reduced to possession but did not.

References

Cited or applied as sec. 77, Second Division Compiled Statutes 1887, in *In re Craigie's Estate*, 24 M 37, 41, 60 P 495; *In re Smith's Estate*, 60 M 276, 298, 199 P 696.

91-1708. (10091) Separate bonds, where more than one administrator. When two or more persons are executors or administrators, the court or judge must require and take a separate bond from each of them.

History: En. Sec. 78, p. 257, L. 1877; re-en. Sec. 78, 2nd Div. Rev. Stat. 1879; re-en. Sec. 78, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2474, C. Civ. Proc. 1895; re-en. Sec. 7455, Rev. C. 1907; re-en. Sec. 10091, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1391.

91-1709. (10092) Several recoveries may be had on same bond. The bond shall not be void upon the first recovery, but may be sued and recovered upon from time to time by any person aggrieved, in his own name, until the whole penalty is exhausted.

History: En. Sec. 79, p. 257, L. 1877; re-en. Sec. 79, 2nd Div. Rev. Stat. 1879; re-en. Sec. 79, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2475, C. Civ. Proc. 1895; re-en. Sec. 7456, Rev. C. 1907; re-en. Sec. 10092, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1392. Executors and Administrators—531, 537. 34 C.J.S. Executors and Administrators §§ 959, 960.

91-1710. (10093) Bonds and justification of sureties on—must be approved. In all cases where bonds or undertakings are required to be given under sections of this Title, the sureties must justify thereon in the same manner and in like amounts as required by section 93-8710, and the certificate thereof must be attached to and filed and recorded with the bond or undertaking. All such bonds and undertakings must be approved by a judge of the district court before being filed or recorded.

History: En. Sec. 80, p. 258, L. 1877; re-en. Sec. 80, 2nd Div. Rev. Stat. 1879; re-en. Sec. 80, 2nd Div. Comp. Stat. 1887; amd. Sec. 2476, C. Civ. Proc. 1895; re-en. Sec. 7457, Rev. C. 1907; re-en. Sec. 10093, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1393.

91-1711. (10094) Citation and requirements of judge on deficient bond—additional security. Before the judge approves the bond required under

sections of this Title, and after its approval, he may, of his own motion, or upon the motion of any person interested in the estate, supported by affidavit that the sureties, or some one of them, are not worth as much as they have justified to, order a citation to issue requiring such sureties to appear before him at a designated time and place, to be examined touching their property and its value; and the judge must, at the same time, cause a notice to be issued to the executor or administrator, requiring his appearance on the return of the citation; and on its return he may examine the sureties and such witnesses as may be produced, touching the property of the sureties and its value; and if, upon such examination, he is satisfied that the bond is insufficient, he must require sufficient additional security.

History: En. Sec. 81, p. 258, L. 1877; re-en. Sec. 81, 2nd Div. Rev. Stat. 1879; re-en. Sec. 81, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2477, C. Civ. Proc. 1895; re-en. Sec. 7458, Rev. C. 1907; re-en. Sec. 10094, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1394.

Operation and Effect

The additional bond which may be exacted from an administrator under sec. 91-1703, upon a sale of real property belonging to the estate in his charge, is distinct from the further security which may

be required under this section and sections 91-1716 and 91-1719, whenever his general bond is deemed insufficient, and, when required, the latter security becomes in contemplation of law a part of his general bond and the sureties become subject to the same measure of liability. *Baker v. Hanson et al.*, 72 M 22, 31, 231 P 902.

References

Cited or applied as sec. 7458, Revised Codes, in *State ex rel. King v. District Court*, 42 M 182, 185, 111 P 717.

91-1712. (10095) Right ceases, when. If sufficient security is not given within the time fixed by the judge's order, the right of such executor or administrator to the administration shall cease, and the person next entitled to the administration on the estate, who shall execute a sufficient bond, must be appointed to the administration.

History: En. Sec. 82, p. 258, L. 1877; re-en. Sec. 82, 2nd Div. Rev. Stat. 1879; re-en. Sec. 82, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2478, C. Civ. Proc. 1895; re-en. Sec. 7459, Rev. C. 1907; re-en. Sec. 10095, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1395.

Executors and Administrators—30.

33 C.J.S. Executors and Administrators § 68.

91-1713. (10096) When bond may be dispensed with. When it is expressly provided in the will that no bond shall be required of the executor, or when it appears to the satisfaction of the court or judge that the estate has, at the time of hearing on the application for letters in such estate, no assets warranting the necessity of a bond, letters testamentary or letters of administration with the will annexed may issue, without any bond, unless the court or judge, for good cause, require one to be executed; but the executor or administrator with the will annexed may at any time afterward, if it appear from any cause necessary or proper, be required to file a bond as in other cases.

History: En. Sec. 83, p. 258, L. 1877; re-en. Sec. 83, 2nd Div. Rev. Stat. 1879; re-en. Sec. 83, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2479, C. Civ. Proc. 1895; re-en. Sec. 7460, Rev. C. 1907; re-en. Sec. 10096, R. C. M. 1921; amd. Sec. 2, Ch. 150, L. 1937. Cal. C. Civ. Proc. Sec. 1396.

Operation and Effect

The right of the court to demand the bond referred to in this section is unquestionable, and conforms with the policy of the probate laws of the state, which enable the court to exercise a supervision over the affairs of the estate, lest because

"of some change in the situation or circumstances of the executor, or for other sufficient cause," the rights of those interested may be endangered. In *re Higgins' Estate*, 15 M 474, 485, 39 P 506.

What Insufficient to Warrant Issuance of Writ in Will Contest Case

Neither the cost of transcript where evidence is essential to a proper determination of an appeal, nor the fact that the

executor was not required to execute a bond for the protection of the estate under the will, is a sufficient reason for the issuance of the writ of supervisory control, since in the latter case the court under this section as amended may for good cause order that a bond be executed notwithstanding such testamentary provision. *State ex rel. Furshong v. District Court*, 105 M 37, 41, 69 P 2d 119.

91-1714. (10097) Petition showing failing sureties and asking for further bonds. Any person interested in an estate may, by verified petition, represent to the court or judge that the sureties of the executor or administrator thereof have become, or are becoming, insolvent, or that they have removed, or are about to remove, from the state, or that from any other cause the bond is insufficient, and ask that further security be required.

History: En. Sec. 84, p. 258, L. 1877; re-en. Sec. 84, 2nd Div. Rev. Stat. 1879; re-en. Sec. 84, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2480, C. Civ. Proc. 1895; re-en. Sec. 7461, Rev. C. 1907; re-en. Sec. 10097, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1397.

91-1715. (10098) Citation to executor, etc., to show cause against such application. If the court or judge is satisfied that the matter requires investigation, a citation must be issued to the executor or administrator, requiring him to appear, at a time and place therein specified, to show cause why he should not give further security. The citation must be served personally on the executor or administrator, at least five days before the return day. If he has absconded, or cannot be found, it may be served by leaving a copy of it at his place of residence, or by such publication as the court or judge may order.

History: En. Sec. 85, p. 259, L. 1877; re-en. Sec. 85, 2nd Div. Rev. Stat. 1879; re-en. Sec. 85, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2481, C. Civ. Proc. 1895; re-en. Sec. 7462, Rev. C. 1907; re-en. Sec. 10098, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1398.

91-1716. (10099) Further security may be ordered. On the return of the citation, or at such other time as the judge may appoint, he must proceed to hear the proofs and allegations of the parties. If it satisfactorily appears that the security from any cause is insufficient, he may make an order requiring the executor or administrator to give further security, or to file a new bond, in the usual form, within a reasonable time, not less than five days.

History: En. Sec. 86, p. 259, L. 1877; re-en. Sec. 86, 2nd Div. Rev. Stat. 1879; re-en. Sec. 86, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2482, C. Civ. Proc. 1895; re-en. Sec. 7463, Rev. C. 1907; re-en. Sec. 10099, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1399.

Operation and Effect

The additional bond which may be exacted from an administrator under sec. 91-1703, upon a sale of real property be-

longing to the estate in his charge, is distinct from the further security which may be required under secs. 91-1711 and 91-1719, and this section, whenever his general bond is deemed insufficient, and, when required, the latter security becomes in contemplation of law a part of his general bond and the sureties become subject to the same measure of liability. *Baker v. Hanson et al.*, 72 M 22, 31, 231 P 902.

91-1717. (10100) Neglecting to obey order. If the executor or administrator neglects to comply with the order within the time prescribed, the judge must, by order, revoke his letters, and his authority must thereupon cease.

History: En. Sec. 87, p. 259, L. 1877; re-en. Sec. 87, 2nd Div. Rev. Stat. 1879; re-en. Sec. 87, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2483, C. Civ. Proc. 1895; re-en. Sec. 7464, Rev. C. 1907; re-en. Sec. 10100, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1400.

Executors and Administrators—30, 32 (1).

33 C.J.S. Executors and Administrators §§ 68, 86; 34 C.J.S. Executors and Administrators §§ 1038, 1062.

91-1718. (10101) Suspending powers of executor, etc. When a petition is presented, praying that an executor or administrator be required to give further security, or to give bond, where, by the terms of the will, no bond was originally required, and it is alleged that the executor or administrator is wasting the property of the estate, the judge may, by order, suspend his powers until the matter can be heard and determined.

History: En. Sec. 88, p. 259, L. 1877; re-en. Sec. 88, 2nd Div. Rev. Stat. 1879; re-en. Sec. 88, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2484, C. Civ. Proc. 1895; re-en. Sec. 7465, Rev. C. 1907; re-en. Sec. 10101, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1401.

References

Cited or applied as sec. 7465, Revised Codes, in State ex rel. King v. District Court, 42 M 182, 185, 111 P 717.

91-1719. (10102) Further security without application of party in interest. When it comes to his knowledge that the bond of any executor or administrator is from any cause insufficient, the judge, without any application, must cause him to be cited to appear and show cause why he should not give further security, and must proceed thereon as upon the application of any person interested.

History: En. Sec. 89, p. 260, L. 1877; re-en. Sec. 89, 2nd Div. Rev. Stat. 1879; re-en. Sec. 89, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2485, C. Civ. Proc. 1895; re-en. Sec. 7466, Rev. C. 1907; re-en. Sec. 10102, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1402.

Operation and Effect

The additional bond which may be exacted from an administrator under sec. 91-1703, upon the sale of real property belonging to the estate in his charge, is distinct from the further security which

may be required under secs. 91-1711, 91-1716, and this section, whenever his general bond is deemed insufficient, and, when required, the latter security becomes in contemplation of law a part of his general bond and the sureties become subject to the same measure of liability. Baker v. Hanson et al., 72 M 22, 31, 231 P 902.

References

Cited or applied as sec. 7466, Revised Codes, in State ex rel. King v. District Court, 42 M 182, 185, 111 P 717.

91-1720. (10103) Release of sureties. When a surety of any executor or administrator desires to be released from responsibility on account of future acts, he may make application to the court or judge for relief. The court or judge must cause a citation to the executor or administrator to be issued, and served personally, requiring him to appear at a time and place, to be therein specified, and to give other security. If he has absconded, left, or removed from the state, or if he cannot be found, after due diligence and inquiry, service may be had as provided in section 91-1715.

History: En. Sec. 90, p. 260, L. 1877; re-en. Sec. 90, 2nd Div. Rev. Stat. 1879; re-en. Sec. 90, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2486, C. Civ. Proc. 1895; re-en. Sec. 7467, Rev. C. 1907; re-en. Secs. 10103, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1403.

Citation, Notice and Jurisdiction

Where a citation to an administrator of an estate of considerable value calling up-

on him to furnish new sureties on his bond pursuant to a petition of a surety company under this section, had a copy of the petition attached to it, the citation, though not as clear as it might have been, was sufficient to put the administrator upon notice and to give the court jurisdiction to revoke his letters upon his failure to furnish new sureties, as against his contention that the citation did not advise

him of the necessity of procuring them.
State ex rel. Gaspar v. District Court, 113
M 318, 323, 124 P 2d 1010.

Executors and Administrators—531.
34 C.J.S. Executors and Administrators
§ 957 et seq.

91-1721. (10104) New sureties. If new sureties be given to the satisfaction of the judge, he may thereupon make an order that the sureties who applied for relief shall not be liable on their bond for any subsequent act, default, or misconduct of the executor or administrator.

History: En. Sec. 91, p. 260, L. 1877; re-en. Sec. 91, 2nd Div. Rev. Stat. 1879; re-en. Sec. 91, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2487, C. Civ. Proc. 1895; re-en. Sec. 7468, Rev. C. 1907; re-en. Sec. 10104, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1404.

91-1722. (10105) Neglect to give new sureties forfeits letters. If the executor or administrator neglects or refuses to give new sureties, to the satisfaction of the judge, on the return of the citation, or within such reasonable time as the judge shall allow, unless the surety making the application shall consent to a longer extension of time, the court or judge must revoke his letters.

History: En. Sec. 92, p. 260, L. 1877; re-en. Sec. 92, 2nd Div. Rev. Stat. 1879; re-en. Sec. 92, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2488, C. Civ. Proc. 1895; re-en. Sec. 7469, Rev. C. 1907; re-en. Sec. 10105, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1405.

Where Order Revoking Letters Not Abuse of Discretion

Held, on original application for a writ to review an order of probate court revoking letters of a general administrator, that where a citation had been issued to him at the instance of a surety company to furnish new sureties, and the order of the

court recited that he had wilfully neglected or refused to try to obtain other security, the court may not be held to have abused its discretion in making the order; also, that if it committed error it was one within jurisdiction reviewable on appeal under sec. 93-8003. State ex rel. Gaspar v. District Court, 113 M 318, 323, 124 P 2d 1010.

Executors and Administrators—30, 32 (1), 35 (1).

33 C.J.S. Executors and Administrators §§ 68, 86, 90; 34 C.J.S. Executors and Administrators §§ 1038, 1062.

91-1723. (10106) Cost of procuring bonds. Any receiver, assignee, guardian, trustee, committee, executor, administrator, curator, or other fiduciary required by law, or the order of any court or the judge thereof, to give a bond or other obligation as such, may include, as a part of the lawful expense of executing his trust, such reasonable sum paid a company authorized under the laws of this state to be or become surety on any such bond, for becoming his surety on such bond or obligation, as may be allowed by the court in which, or a judge before whom, he is required to account, not exceeding one-half of one per cent. per annum on the amount of such bond; and in all actions and proceedings the party entitled to recover costs therein shall be allowed and may tax and recover such sum paid such company for executing any bond, recognizance, undertaking, stipulation, or other obligation therein, not exceeding, however, one-half of one per cent. on the amount of such bond, recognizance, undertaking, stipulation, or other obligation, during each year same has been in force.

History: En. Sec. 1, Ch. 78, L. 1903; re-en. Sec. 7723, Rev. C. 1907; re-en. Sec. 10106, R. C. M. 1921.

Executors and Administrators—109 (5).
33 C.J.S. Executors and Administrators
§ 232.

CHAPTER 18

SPECIAL ADMINISTRATORS AND THEIR POWERS AND DUTIES

- Section 91-1801. Special administrators—when appointed.
 91-1802. Special letters may issue at any time.
 91-1803. Preference given to persons entitled to letters.
 91-1804. Special administrator to give bond and take oath.
 91-1805. Duties of special administrator.
 91-1806. When letters testamentary or of administration are granted, special administrator's powers cease.
 91-1807. Special administrator to render account.

91-1801. (10107) Special administrators—when appointed. When there is delay in granting letters testamentary or of administration from any cause, or when such letters are granted irregularly, or no sufficient bond is filed as required, or when no application is made for such letters, or when an executor or administrator dies, or is suspended, or removed, the court or judge must appoint a special administrator to collect and take charge of the estate of the decedent in whatever county or counties the same may be found, and to exercise such other powers as may be necessary for the preservation of the estate.

History: En. Sec. 95, p. 261, L. 1877; re-en. Sec. 95, 2nd Div. Rev. Stat. 1879; re-en. Sec. 95, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2500, C. Civ. Proc. 1895; re-en. Sec. 7470, Rev. C. 1907; re-en. Sec. 10107, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1411.

Compensation

The court has a discretionary power to grant a special administrator compensation for his services. In *re Ford's Estate*, 29 M 283, 286, 74 P 735.

Emergency Officer

A special administrator within the meaning of this section, is one appointed to take temporary charge of an estate until general letters are issued, or during the suspension of a general administrator, and the like; he is an emergency officer appointed solely for the purpose of conserving the property in default of a qualified executor or general administrator. *State ex rel. McCabe v. District Court*, 106 M 272, 276, 76 P 2d 634.

Function of Special Administrator

The functions of a special administrator being limited by this section and section 91-1805, to the exercise of powers necessary to collect and preserve the estate for the executor or administrator to be regularly appointed, an order by a district judge directing a special administrator to pay an indebtedness of the estate is void. *State ex rel. Bartlett v. District Court*, 18 M 481, 485, 46 P 259. See also In *re Ford's Estate*, 29 M 283, 287, 74 P 735; In *re Williams' Estate*, 55 M 63, 67, 173 P 790.

Limitations on Exercise of Power

Special administrators are without power to have appraisers appointed, or give notice to creditors for the presentation of claims. In *re Ford's Estate*, 29 M 283, 287, 74 P 735.

The district court is without power to require a special administrator to go beyond the fair import of the terms of the statute governing his actions. In *re Williams' Estate*, 55 M 63, 67, 173 P 790.

"Must"

Construing the declaration in this section that the "court or judge must appoint a special administrator to collect and take charge of the estate, etc.," held, that compulsory appointment need only be made where a showing of necessity to preserve the estate is made; the court is not deprived of all discretion in the matter, under certain conditions the word "must" being given the meaning of "may." *State ex rel. McCabe v. District Court*, 106 M 272, 277, 76 P 2d 634.

Public Administrator Denied Appointment Over Widow's Nominee

Application for writ of supervisory control to compel district court to annul an order refusing to appoint a public administrator as special administrator in face of application of decedent's widow waiving her right to appointment but nominating a second person therefor upon the death of an administrator, denied, the respondent court not having acted under a mistaken view of the law nor in willful disregard of it, and its action not resulting in gross injustice. *State ex rel. McCabe*

v. District Court, 106 M 272, 280, 76 P 2d 634.

When Authority Ceases

The office of special administrator is statutory, his powers and duties are limited to those enumerated in the statute, and his authority ceases automatically upon the appointment and qualification of the executor or general administrator. In re Williams' Estate, 55 M 63, 67, 173 P 790.

When Special Administrator Is Proper

Where the appointment of an administrator is delayed through a contest over the right to letters, the special administrator may be substituted in pending actions brought by decedent, under this section and section 91-1805. Quinn's Admr. v. Quinn, 22 M 403, 415, 56 P 824.

Widow's Control Continues in a Proper Case

A widow's control of her husband's estate is not exhausted by nominating an

administrator, but upon death of such administrator her right to re-nominate continues in a proper case when necessary to such control. State ex rel. McCabe v. District Court, 106 M 272, 279, 76 P 2d 634.

References

Cited or applied as sec. 2500, Code of Civil Procedure, in State ex rel. Eakins v. District Court, 34 M 226, 228, 85 P 1022; State ex rel. McKennan v. District Court, 69 M 340, 343, 222 P 426.

Executors and Administrators—22.

34 C.J.S. Executors and Administrators § 1035 et seq.

21 Am. Jur. 831-833, Executors and Administrators, §§ 804-809.

Person to be appointed as special or temporary administrator pending will contest. 136 ALR 604.

Authority of special or temporary administrator, or administrator pendente lite, to dispose of, distribute, lease or encumber property of estate. 148 ALR 275.

91-1802. (10108) Special letters may issue at any time. The appointment may be made at any time, and without notice, and must be made by entry upon the minutes of the court, specifying the powers to be exercised by the administrator. Upon such order being entered, and after the person appointed has given bond, the clerk must issue letters of administration to such person in conformity with the order.

History: En. Sec. 96, p. 261, L. 1877; re-en. Sec. 96, 2nd Div. Rev. Stat. 1879; re-en. Sec. 96, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2501, C. Civ. Proc. 1895; re-en. Sec. 7471, Rev. C. 1907; re-en. Sec. 10108, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1412.

Improper Appointment of General Administrator Not Sustainable as Appointment of Special Administrator

Where the appointment of a general administrator was void because made without complying with the statutory requirements, the appointment may not be sustained on the theory that he was a special

administrator (whom it is contended could be appointed without notice), such contention not aiding respondent's position any, as a special administrator would have no authority to sell all the property of the estate as attempted here. State ex rel. Gaspar v. District Court, 113 M 318, 323, 124 P 2d 1010.

References

State ex rel. McKennan v. District Court, 69 M 340, 343, 222 P 426; State ex rel. McCabe v. District Court, 106 M 272, 277, 76 P 2d 634.

91-1803. (10109) Preference given to persons entitled to letters. In making the appointment of a special administrator, the court or judge must give preference to the person entitled to letters testamentary or of administration, but no appeal must be allowed from the appointment.

History: En. Sec. 97, p. 261, L. 1877; re-en. Sec. 97, 2nd Div. Rev. Stat. 1879; re-en. Sec. 97, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2502, C. Civ. Proc. 1895; re-en. Sec. 7472, Rev. C. 1907; re-en. Sec. 10109, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1413.

Operation and Effect

Where there exists a legal cause for the appointment of a special administrator, the

district court must appoint some one entitled to such appointment; and the selection of a public administrator to act as such officer, in preference to the widow of decedent, who had been named as legatee and devisee in the will and as executrix thereof, was a violation of the provisions of this section. State ex rel. Eakins v. District Court, 34 M 226, 231, 85 P 1022.

In the absence of a showing of incom-

petency, the person who is entitled to letters testamentary or of administration must be given preference in the selection of a special administrator, and a refusal to do so is a direct violation of this section. *State ex rel. Cotter v. District Court*, 49 M 146, 148, 140 P 732.

A person named as executor in a will is, in a case where it is necessary to appoint a special administrator, entitled to the appointment. *In re Williams' Estate*, 55 M 63, 66, 173 P 790.

Where a will, valid on its face, names an executor and it becomes necessary to appoint a special administrator of the es-

tate, preference should be given to the person named as executor, and where an executor is not named in the will, the court should give like preference to the person entitled to letters of administration. *State ex rel. McKennan v. District Court*, 69 M 340, 343, 222 P 426.

References

Cited or applied as sec. 7472, Revised Codes, in *In re Dolenty's Estate*, 53 M 33, 47, 161 P 524; *State ex rel. McCabe v. District Court*, 106 M 272, 276, 76 P 2d 634.

91-1804. (10110) Special administrator to give bond and take oath.

Before any letters issue to any special administrator, he must give bonds in such sum as the court or judge may direct, with sureties to the satisfaction of the court or judge, conditioned for the faithful performance of his duties; and he must take the usual oath, and have the same indorsed on his letters.

History: En. Sec. 98, p. 262, L. 1877; re-en. Sec. 98, 2nd Div. Rev. Stat. 1879; re-en. Sec. 98, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2503, C. Civ. Proc. 1895; re-en. Sec. 7473, Rev. C. 1907; re-en. Sec. 10110, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1414.

Executors and Administrators—25, 26.
33 C.J.S. Executors and Administrators § 66.

91-1805. (10111) Duties of special administrator. The special administrator must collect and preserve for the executor or administrator all the goods, chattels, debts, and effects of the decedent, all incomes, rents, issues, and profits, claims, and demands of the estate; must take charge and management of, enter upon, and preserve from damage, waste, and injury, the real estate; and for any such and all necessary purposes may commence and maintain or defend suits and other legal proceedings as an administrator; he may sell such perishable property as the court or judge may order to be sold, and exercise such other powers as are conferred upon him by his appointment, but in no case is he liable to an action by any creditor on a claim against the decedent.

History: En. Sec. 99, p. 262, L. 1877; re-en. Sec. 99, 2nd Div. Rev. Stat. 1879; re-en. Sec. 99, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2504, C. Civ. Proc. 1895; re-en. Sec. 7474, Rev. C. 1907; re-en. Sec. 10111, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1415.

Operation and Effect

This code limits the functions of a special administrator to the exercise of powers necessary to collect and preserve the estate for the executor or administrator to be regularly appointed. *In re Ford's Estate*, 29 M 283, 287, 74 P 735.

A special administrator has exclusive control over the estate for the time being, and until he is displaced by the appointment and qualification of an executor or general administrator. *Murphy v. Nett*, 51 M 82, 87, 149 P 713.

The powers of a special administrator are limited to the preservation and protection of the estate temporarily, until a general administrator or an executor has been appointed. *In re Dolenty's Estate*, 53 M 33, 44, 161 P 524.

A special administrator by virtue of the provision of this section, conferring upon him the power to commence suits for "all necessary purposes" possessed by an administrator, has the right to maintain an action to recover from a mining partner of the decedent his proportionate share of debts of the partnership paid by decedent, and may do so without an order of court authorizing him to do so. *Bielenberg v. Higgins et al.*, 85 M 56, 67, 277 P 631.

Though it may have been the part of wisdom to permit a special administrator

placed in charge of the estates of two partners who met death simultaneously to continue operation of the partnership business for the purpose of avoiding loss, the arrangement should have been only of a temporary character, it having been the duty of the administrator to take immediate steps to dispose of the property and goodwill of the concern. *In re Rinio's Estate*, 93 M 428, 431, 432, 19 P 2d 322.

References

Cited or applied as sec. 2504, Code of

Civil Procedure, in *State ex rel. Bartlett v. District Court*, 18 M 481, 485, 46 P 259; *Quinn's Admr. v. Quinn*, 22 M 403, 415, 56 P 824; as sec. 7474, Revised Codes, in *In re Williams' Estate*, 55 M 63, 72, 173 P 790.

Executors and Administrators⇒122.

34 C.J.S. Executors and Administrators § 1040.

21 Am. Jur. 833-835, Executors and Administrators, §§ 813-816.

91-1806. (10112) When letters testamentary or of administration are granted, special administrator's powers cease. When letters testamentary or of administration on the estate of the decedent have been granted, the powers of the special administrator cease, and he must forthwith deliver to the executor or administrator all the property and effects of the decedent in his hands, and the executor may prosecute to final judgment any suit commenced by the special administrator.

History: En. Sec. 100, p. 262, L. 1877; re-en. Sec. 100, 2nd Div. Rev. Stat. 1879; re-en. Sec. 100, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2505, C. Civ. Proc. 1895; re-en. Sec. 7475, Rev. C. 1907; re-en. Sec. 10112, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1416.

References

Cited or applied as sec. 7475, Revised

Codes, in *In re Williams' Estate*, 55 M 63, 67, 173 P 790; *State ex rel. McCabe v. District Court*, 106 M 272, 276, 76 P 2d 634.

Executors and Administrators⇒31.

33 C.J.S. Executors and Administrators § 78; 34 C.J.S. Executors and Administrators § 1039.

91-1807. (10113) Special administrator to render account. The special administrator must render an account, on oath, of his proceedings, in a like manner as other administrators are required to do.

History: En. Sec. 101, p. 262, L. 1877; re-en. Sec. 101, 2nd Div. Rev. Stat. 1879; re-en. Sec. 101, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2506, C. Civ. Proc. 1895; re-en. Sec. 7476, Rev. C. 1907; re-en. Sec. 10113, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1417.

References

Cited or applied as sec. 2506, Code of

Civil Procedure, in *In re Ford's Estate*, 29 M 283, 286, 74 P 735; as sec. 7476, Revised Codes, in *In re Williams' Estate*, 55 M 63, 67, 173 P 790.

Executors and Administrators⇒463.

34 C.J.S. Executors and Administrators §§ 830, 831.

CHAPTER 19

CHANGES IN ADMINISTRATION ON SUBSEQUENT DISCOVERY OF A WILL OR DEATH, INCOMPETENCY OR RESIGNATION OF EXECUTORS AND ADMINISTRATORS

- Section 91-1901. On proof of will, after grant of letters of administration, letters revoked.
 91-1902. Power of executor in such case.
 91-1903. Remaining executor or administrator to continue when his colleagues are disqualified.
 91-1904. Who to act when all acting are incompetent.
 91-1905. Executor or administrator may resign, when—court to appoint successor—liability of outgoer.
 91-1906. All acts of executor, etc., valid until his power is revoked.

91-1901. (10114) On proof of will, after grant of letters of administration, letters revoked. If, after granting letters of administration on the

ground of intestacy, a will of the decedent is duly proved and allowed by the court or judge, the letters of administration must be revoked, and the power of the administrator ceases, and he must render an account of his administration within such time as the court or judge shall direct.

History: Secs. 10114-10119, with 10067, en. in L. 1877; en. Sec. 102, p. 262, L. 1877; re-en. Sec. 102, 2nd Div. Rev. Stat. 1879; re-en. Sec. 102, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2510, C. Civ. Proc. 1895; re-en. Sec. 7477, Rev. C. 1907; re-en. Sec. 10114, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1423.

Operation and Effect

The admission of a will to probate, ipso facto, supersedes and vacates the grant of

letters of general administration. In re Davis-Cummings' Appeal, 11 M 196, 213, 28 P 645.

Executors and Administrators—31, 35 (1), 458, 459.

33 C.J.S. Executors and Administrators §§ 78, 90; 34 C.J.S. Executors and Administrators §§ 828, 829, 837, 1039.

21 Am. Jur. 456, Executors and Administrators, § 145.

91-1902. (10115) Power of executor in such case. In such case, the executor or the administrator with the will annexed is entitled to demand, sue for, recover, and collect all the rights, goods, chattels, debts, and effects of the decedent remaining unadministered, and may prosecute to final judgment any suit commenced by the administrator before the revocation of his letters of administration.

History: En. Sec. 103, p. 262, L. 1877; re-en. Sec. 103, 2nd Div. Rev. Stat. 1879; re-en. Sec. 103, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2511, C. Civ. Proc. 1895; re-en. Sec. 7478, Rev. C. 1907; re-en. Sec. 10115, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1424.

Executors and Administrators—120 (1), 121.

34 C.J.S. Executors and Administrators §§ 1023, 1025-1030.

91-1903. (10116) Remaining executor or administrator to continue when his colleagues are disqualified. In case any one of several executors or administrators, to whom letters are granted, dies, becomes lunatic, is convicted of an infamous crime, or otherwise becomes incapable of executing the trust, or in case the letters testamentary or of administration are revoked or annulled, with respect to any one executor or administrator, the remaining executor or administrator must proceed to complete the execution of the will or administration.

History: En. Sec. 104, p. 263, L. 1877; re-en. Sec. 104, 2nd Div. Rev. Stat. 1879; re-en. Sec. 104, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2512, C. Civ. Proc. 1895; re-en. Sec. 7479, Rev. C. 1907; re-en. Sec. 10116, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1425.

Executors and Administrators—126, 127.

34 C.J.S. Executors and Administrators §§ 1046, 1047.

91-1904. (10117) Who to act when all acting are incompetent. If all such executors or administrators die or become incapable, or the power and authority of all of them is revoked, the court or judge must issue letters of administration, with the will annexed or otherwise, to the widow or next of kin, or others, in the same order and manner as is directed in relation to original letters of administration. The administrators so appointed must give bond in the like penalty, with like sureties and conditions, as hereinbefore required of administrators, and shall have the like power and authority.

History: En. Sec. 105, p. 263, L. 1877; re-en. Sec. 105, 2nd Div. Rev. Stat. 1879; re-en. Sec. 105, 2nd Div. Comp. Stat. 1887;

re-en. Sec. 2513, C. Civ. Proc. 1895; re-en. Sec. 7480, Rev. C. 1907; re-en. Sec. 10117, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1426.

References

- In re Kern's Estate, 96 M 443, 447, 31 P 2d 313.
- Executors and Administrators 21, 26, 121.
34 C.J.S. Executors and Administrators § 1035 et seq.

91-1905. (10118) Executor or administrator may resign, when—court to appoint successor—liability of outgoer. Any executor or administrator may, at any time, by writing, filed in the court, resign his appointment, having first settled his accounts and delivered up all the estate to the person whom the court or judge shall appoint to receive the same. If, however, by reason of any delays in such settlement and delivering up of the estate, or for any other cause, the circumstances of the estate or the rights of those interested therein require it, the court may, at any time before settlement of accounts and delivering up of the estate is completed, revoke the letters of such executor or administrator, and appoint in his stead an administrator, either special or general, in the same manner as is directed in relation to original letters of administration. The liability of the outgoing executor or administrator, or of the sureties on his bond, shall not be in any manner discharged, released, or affected by such appointment or resignation.

History: En. Sec. 106, p. 263, L. 1877; re-en. Sec. 106, 2nd Div. Rev. Stat. 1879; re-en. Sec. 106, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2514, C. Civ. Proc. 1895; re-en. Sec. 7481, Rev. C. 1907; re-en. Sec. 10118, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1427.

33 C.J.S. Executors and Administrators §§ 78, 79, 82; 34 C.J.S. Executors and Administrators §§ 959, 960, 1062.

21 Am. Jur. 457, Executors and Administrators, §§ 148, 149.

Right of executor or administrator to resign. 91 ALR 712.

Executors and Administrators 33, 35, 531.

91-1906. (10119) All acts of executor, etc., valid until his power is revoked. All acts of an executor or administrator, as such, before the revocation of his letters testamentary or of administration, are as valid, to all intents and purposes, as if such executor or administrator had continued lawfully to execute the duties of his trust.

History: En. Sec. 107, p. 264, L. 1877; re-en. Sec. 107, 2nd Div. Rev. Stat. 1879; re-en. Sec. 107, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2515, C. Civ. Proc. 1895; re-en. Sec. 7482, Rev. C. 1907; re-en. Sec. 10119, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1428.

Executors and Administrators 35 (20).

33 C.J.S. Executors and Administrators §§ 92, 93, 94.

CHAPTER 20

DISQUALIFICATION OF JUDGE AND TRANSFER OF ADMINISTRATION

- Section 91-2001. Disqualification of judges.
91-2002. Transfer of proceedings.
91-2003. Transfer not to change right to administer—retransfer—how made.
91-2004. When proceedings to be returned to original court.

91-2001. (10120) Disqualification of judges. No will shall be admitted to probate, or letters testamentary or of administration granted, before any judge who is interested as next of kin to the decedent, or as legatee or devisee under the will, or when he is named as executor or trustee in the will, or is a witness thereto, and any judge who shall have acted as attorney

for the decedent in the preparation or drawing of the will, or as the attorney of the executor or administrator of the estate of any deceased person, in the administration of the estate of such deceased person, or as the attorney of any legatee or devisee under the will, or heir of the decedent, or of any person or persons claiming to be such legatee, devisee, or heir, shall, from and after the approval of this act, be disqualified from making any order, or rendering any judgment or decree, or doing anything whatsoever in the matter of the estate of such deceased person. Whenever it shall be made to appear of record that any judge presiding in any court in which proceedings in probate matters have been, or are about to be, instituted, is disqualified from acting therein, it shall be the duty of such judge to, as soon thereafter as practicable, request the nearest district judge to preside in the place of the judge so disqualified in such proceedings. It shall be the duty of the judge so requested, if he be not himself disqualified, to, from time to time as occasion may require, preside in the place of the disqualified judge in all proceedings in such probate matters.

History: Ap. p. Sec. 109, p. 264, L. 1877; re-en. Sec. 109, 2nd Div. Rev. Stat. 1879; re-en. Sec. 109, 2nd Div. Comp. Stat. 1887; amd. Sec. 2530, C. Civ. Proc. 1895; en. Sec. 1, p. 244, L. 1897; re-en. Sec. 7484, Rev. C. 1907; re-en. Sec. 10120, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1430.

Operation and Effect

The provision of this section declaring that the judge, whenever any of the grounds of disqualification are made to appear of record, shall thereafter call in another judge, who shall from time to time preside in the place of the disqualified judge, implies that any of the disqualifications enumerated may be made

to appear at any time. State ex rel. Nisler v. Donlan, 32 M 256, 266, 80 P 244.

References

Cited or applied as section 2530, Code of Civil Procedure, as amended, in Farleigh v. Kelly, 24 M 369, 375, 62 P 495, 685; State ex rel. Carleton v. District Court, 33 M 138, 141, 82 P 789, 8 Ann. Cas. 752; as section 7484, Revised Codes, in State ex rel. Jacobs v. District Court, 48 M 410, 414, 138 P 1091; State ex rel. Mannix v. District Court, 51 M 310, 315, 152 P 753.

Judges—39 et seq.

48 C.J.S. Judges §§ 72, 74, 77, 90, 91, 97.

91-2002. (10121) Transfer of proceedings. When a petition is filed in the district court, praying for admission to probate of a will, or for granting letters testamentary or of administration, or when proceedings are pending in the court for the settlement of an estate, and there is no judge of said court qualified to act, an order must be made transferring the proceeding to the district court of an adjoining county; and the clerk of the court ordering the transfer must transmit to the clerk of the court to which the proceeding is ordered to be transferred a certified copy of the order, and all the papers on file in his office in the proceeding; and thereafter the court or judge to which the proceeding is transferred shall exercise the same authority and jurisdiction over the estate, and all matters relating to the administration thereof, as if it had original jurisdiction over the estate.

History: En. Sec. 110, p. 264, L. 1877; re-en. Sec. 110, 2nd Div. Rev. Stat. 1879; re-en. Sec. 110, 2nd Div. Comp. Stat. 1887; amd. Sec. 2531, C. Civ. Proc. 1895; re-en. Sec. 7485, Rev. C. 1907; re-en. Sec. 10121, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1431.

References

Cited or applied as sec. 7485, Revised

Codes, in State ex rel. Mannix v. District Court, 51 M 310, 315, 152 P 753.

Venue—49 et seq.; Wills—258.

67 C.J. Venue § 245 et seq.; 68 C.J. Wills § 693.

91-2003. (10122) Transfer not to change right to administer—retransfer—how made. The transfer of a proceeding from one court to another, as provided for in the preceding section, shall not affect the right of any person to letters testamentary or of administration on the estate transferred, but the same persons are entitled to letters testamentary or of administration on the estate, in the order herein provided. If, before the administration is closed on any estate so transferred as herein provided, another person is elected or appointed, and qualified as judge of the court wherein such proceeding was originally commenced, who is not disqualified to act in the settlement of the estate, and the causes for which the proceeding was transferred no longer exist, any person interested in the estate may have the proceeding returned to the court from which it was originally transferred, by filing a petition setting forth these facts, and moving the court therefor.

History: En. Sec. 111, p. 265, L. 1877; re-en. Sec. 111, 2nd Div. Rev. Stat. 1879; re-en. Sec. 111, 2nd Div. Comp. Stat. 1887; amd. Sec. 2532, C. Civ. Proc. 1895; re-en. Sec. 7486, Rev. C. 1907; re-en. Sec. 10122, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1432.

Executors and Administrators 17 et seq.; Venue 78-81.

33 C.J.S. Executors and Administrators § 31 et seq.; 67 C.J. Venue § 350 et seq.

91-2004. (10123) When proceedings to be returned to original court. On hearing the motion, if the facts required by the preceding section to be set out in the petition are satisfactorily shown, and it further appears to the court that the convenience of the parties interested would be promoted by such change, the judge must make an order transferring the proceeding back to the court where it originally commenced; and the clerk of the court ordering the transfer must transmit to the clerk of the court in which the proceeding was originally commenced a certified copy of the order, and all the original papers on file in his office in the proceeding, and the court where the proceeding was originally commenced shall thereafter have jurisdiction and power to make all necessary orders and decrees to close up the administration of the estate.

History: En. Sec. 112, p. 265, L. 1877; re-en. Sec. 112, 2nd Div. Rev. Stat. 1879; re-en. Sec. 112, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2533, C. Civ. Proc. 1895; re-en.

Sec. 7487, Rev. C. 1907; re-en. Sec. 10123, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1433.

Venue 81.

67 C.J. Venue § 353 et seq.

CHAPTER 21

REMOVAL AND SUSPENSION OF EXECUTORS AND ADMINISTRATORS

- Section 91-2101. Suspension of powers of executor.
 91-2102. Executor to have notice of his suspension and to be cited to appear.
 91-2103. Any party interested may appear on hearing.
 91-2104. Notice to absconding executors and administrators.
 91-2105. May compel attendance.

91-2101. (10124) Suspension of powers of executor. Whenever the judge of a district court has reason to believe, from his own knowledge, or from credible information, that any executor or administrator has wasted, embezzled, or mismanaged, or is about to waste or embezzle, the property of the estate committed to his charge, or has committed, or is about to

commit, a fraud upon the estate, or is incompetent to act, or has permanently removed from the state, or has wrongfully neglected the estate, or has neglected to perform any act as such executor or administrator, he must, by an order entered upon the minutes of the court, suspend the powers of such executor or administrator until the matter is investigated.

History: En. Sec. 113, p. 266, L. 1877; re-en. Sec. 113, 2nd Div. Rev. Stat. 1879; re-en. Sec. 113, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2540, C. Civ. Proc. 1895; re-en. Sec. 7488, Rev. C. 1907; re-en. Sec. 10124, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1436.

Cross-References

Conversion by executor constitutes larceny, sec. 94-2715.

Failure to file report, revocation of letters, sec. 94-3501.

Duty of Court Where Long Delay

Where the district court sitting in probate has a verified petition before it asserting long delay in winding up the affairs of the estate and nonpayment of established claims, it is the court's duty to investigate the activities of such executor, regardless of the status of the petitioner as an alien enemy or ally thereof, the executor being under the bounden duty to proceed with the utmost expedition to settle the affairs of the estate unless sufficient reasons appear compelling different action; carrying on decedent's business is no excuse even though the interested benefit, unless all such consent to the delay. State ex rel. Biering v. District Court, 115 M 174, 181, 140 P 2d 583.

Even a Surviving Spouse May be Removed

Even a surviving spouse, acting as representative, may be removed for grave delinquencies. In re Dolenty's Estate, 53 M 33, 47, 161 P 524.

The statute makes no distinction between the surviving spouse, acting as representative, and any other person whose appointment was properly made in the first place; she may be removed for cause. In re Dolenty's Estate, 53 M 33, 48, 161 P 524.

Public Administrator Denied Appointment Over Widow's Nominee

Application for writ of supervisory control to compel district court to annul an order refusing to appoint a public administrator as special administrator in face of application of decedent's widow waiving her right to appointment but nominating a second person therefor upon the death of an administrator, denied, the respondent court not having acted under a mistaken view of the law nor in willful disregard of it, and its action not resulting in gross

injustice. State ex rel. McCabe v. District Court, 106 M 272, 280, 76 P 2d 634.

What Constitutes Grounds for Removal

The law does not favor the administration of estates by a person under conditions likely to result in a conflict of interests in the performance of his duty, as where he administers the estates of two partners and at the same time carries on the partnership business virtually as a surviving partner, and in the meantime fails to ascertain the rights of the estates in the business or make reports required by statutes; in such circumstances he is incompetent to serve, as a legal proposition, under this section. In re Rinio's Estate, 93 M 428, 436, 19 P 2d 322.

What Does Not Constitute Grounds for Removal

The fact that a report was not made for a period of five years, and which when made was approved by the other heirs, and that suit had been instituted by the other heirs to cancel a mortgage executed by the executrix upon the ground of undue influence, does not constitute ground for the removal or suspension of the executrix. In re Ming, 15 M 79, 85, 38 P 228.

Where Removal of Executors Denied Because Ineffective and Court Ordered to Expedite Distribution

Where, on appeal from an order of the district court refusing to remove executors for disregard of statutory provisions, and failure to file an account in seven years, to which delay the heirs had contributed by consenting to lease ranch land to the executor and leaving the management to him, sufficient appeared to warrant reversal of the order thus causing further delay in the distribution of the estate, there being nothing remaining to be done but pay a small debt and executors fees which could be advanced by heirs or obtained by a mortgage, held, order affirmed and trial court ordered to expedite distribution. In re Ryan's Estate, 109 M 340, 343, 96 P 2d 916.

References

Cited or applied as sec. 7488, Revised Codes, in State ex rel. King v. District Court, 42 M 182, 185, 111 P 717; Mayger v. St. Louis Min. etc. Co., 68 M 492, 500, 219 P 1102; In re Connolly's Estate, 73 M

35, 44 et seq., 235 P 408; State ex rel. O'Sullivan v. District Court, — M —, 175 P 2d 763, 765.

Executors and Administrators—35.

33 C.J.S. Executors and Administrators § 89 et seq.

21 Am. Jur., Executors and Administrators, p. 457, § 147; pp. 458-464, §§ 150-161.

What effects removal of executor or administrator. 8 ALR 175.

Status and act of one appointed executor or administrator who was ineligible. 14 ALR 619.

Allowance for expenses and disbursement by executor or administrator after revocation of his letters. 31 ALR 846.

Dilatoriness of executor or administra-

tor in filing inventory or making report, as grounds for removal. 72 ALR 956.

Right of executor or administrator to resign. 91 ALR 712.

Effect of proceedings to supplant administrator or executor, or of appeal from order appointing or removing him, upon right of person who dealt with him pending such proceeding or appeal. 99 ALR 862.

Right to appeal, without bond, from order, decree, or judgment removing executor or administrator. 104 ALR 1197.

Personal interest of executor or administrator adverse to or conflicting with those of other persons interested in estate as grounds for revocation of letters or removal. 119 ALR 306.

91-2102. (10125) Executor to have notice of his suspension and to be cited to appear. When such suspension is made, the notice thereof must be given to the executor or administrator, and he must be cited to appear and show cause why his letters should not be revoked. If he fail to appear in obedience to the citation, or, if appearing, the court or judge is satisfied that there exists cause for his removal, his letters must be revoked and letters of administration granted anew, as the case may require.

History: En. Sec. 114, p. 267, L. 1877; re-en. Sec. 114, 2nd Div. Rev. Stat. 1879; re-en. Sec. 114, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2541, C. Civ. Proc. 1895; re-en. Sec. 7489, Rev. C. 1907; re-en. Sec. 10125, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1437.

References

Cited or applied as sec. 7489, Revised Codes, in *In re Dolenty's Estate*, 53 M 33, 47, 161 P 524; *Mayger v. St. Louis Min. etc. Co.*, 68 M 492, 500, 219 P 1102; State ex rel. O'Sullivan v. District Court, — M —, 175 P 2d 763, 765.

91-2103. (10126) Any party interested may appear on hearing. At the hearing, any person interested in the estate may appear and file his allegations in writing, showing that the executor or administrator should be removed, to which the executor or administrator may demur or answer, as hereinbefore provided. The issues raised must be heard and determined by the court or judge.

History: En. Sec. 115, p. 267, L. 1877; re-en. Sec. 115, 2nd Div. Rev. Stat. 1879; re-en. Sec. 115, 2nd Div. Comp. Stat. 1887;

re-en. Sec. 2542, C. Civ. Proc. 1895; re-en. Sec. 7490, Rev. C. 1907; re-en. Sec. 10126, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1438.

91-2104. (10127) Notice to absconding executors and administrators. If the executor or administrator has absconded or conceals himself, or has removed or absented himself from the state, notice may be given to him of the pendency of the proceedings by publication, in such manner as the court or judge may direct, and the court or judge may proceed upon such notice as if the citation had been personally served.

History: En. Sec. 116, p. 267, L. 1877; re-en. Sec. 116, 2nd Div. Rev. Stat. 1879; re-en. Sec. 116, 2nd Div. Comp. Stat. 1887;

re-en. Sec. 2543, C. Civ. Proc. 1895; re-en. Sec. 7491, Rev. C. 1907; re-en. Sec. 10127, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1439.

91-2105. (10128) May compel attendance. In the proceedings authorized by the preceding sections of this chapter, for the removal of an executor or administrator, the court or judge may compel his attendance by attachment, and may compel him to answer questions, on oath, touching

his administration, and, upon his refusal so to do, may commit him until he obey, or may revoke his letters, or both.

History: En. Sec. 117, p. 267, L. 1877; re-en. Sec. 117, 2nd Div. Rev. Stat. 1879; re-en. Sec. 117, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2454, C. Civ. Proc. 1895; re-en. Sec. 7492, Rev. C. 1907; re-en. Sec. 10128, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1440.

Operation and Effect

It is within the power of a court to require an executor or administrator, who has been remiss in his duties, to turn over to his successor all property of the estate which has come into his hands. State ex.

rel. Klein v. District Court, 35 M 364, 366, 90 P 161.

If a court goes beyond its powers in holding an executor to account for profits, or in removing him from office, he has the right of appeal. State ex rel. Klein v. District Court, 35 M 364, 367, 90 P 161.

Executors and Administrators—35 (15, 16).

33 C.J.S. Executors and Administrators §§ 91, 94.

CHAPTER 22

INVENTORY AND APPRAISEMENT—POSSESSION OF ESTATE

- Section 91-2201. Inventory to be returned, including the homestead.
 91-2202. Appointment and pay of appraisers.
 91-2203. Oath of appraisers and inventory.
 91-2204. Inventory to account for moneys—if all money, no appraisalment necessary.
 91-2205. Effect of naming a debtor executor.
 91-2206. Debt or demand of testator not discharged by terms of will if necessary for payment of debts.
 91-2207. To make oath to inventory.
 91-2208. Revocation of letters and liability of representative for failure to make return.
 91-2209. Inventory of after-discovered property.
 91-2210. Administrator and executor to possess real and personal estate.
 91-2211. Executor or administrator to deliver real estate to heirs or devisees, when.

91-2201. (10129) Inventory to be returned, including the homestead.

Every executor or administrator must make and return to the court, within three months after his appointment, a true inventory and appraisalment of all the estate of the decedent, including the homestead, if any, which has come to his possession or knowledge.

History: En. Sec. 118, p. 267, L. 1877; re-en. Sec. 118, 2nd Div. Rev. Stat. 1879; re-en. Sec. 118, 2nd Div. Comp. Stat. 1887; amd. Sec. 2550, C. Civ. Proc. 1895; re-en. Sec. 7493, Rev. C. 1907; re-en. Sec. 10129, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1443.

take possession as soon as he is appointed, and to make and return to the court an inventory and appraisalment of all the property which comes into his hands. In re Colbert's Estate, 44 M 259, 266, 119 P 791.

Operation and Effect

The filing of an inventory and appraisalment, as required by this section and section 91-2209, is not a prerequisite to the taking possession of property of a decedent by an administrator. Black v. Story, 7 M 238, 243, 14 P 703.

The object of the inventory is to show creditors and other persons interested of what the estate may consist. In re Higgins' Estate, 15 M 474, 484, 39 P 506.

It is the duty of the administrator to

References

Cited or applied as sec. 7493, Revised Codes, in State ex rel. Floyd v. District Court, 41 M 357, 364, 109 P 438; Swanberg v. National Surety Co., 86 M 340, 355, 283 P 761.

Executors and Administrators—63.

33 C.J.S. Executors and Administrators § 129.

21 Am. Jur. 469-472, Executors and Administrators, §§ 171-180.

91-2202. (10130) Appointment and pay of appraisers. To make the appraisalment, the court or judge must appoint three disinterested persons,

any two of whom may act, who are entitled to receive a reasonable compensation for their services, not to exceed five dollars per day, to be allowed by the court or judge. The appraisers must, with the inventory, file a verified account of their services and disbursements; if only one day's service is charged, the account need not be verified. If any part of the estate is in any other county than that in which letters issued, appraisers thereof may be appointed by the district court or judge having jurisdiction of the estate, or by the district court or judge of such other county, on request of the court or judge having jurisdiction.

History: En. Sec. 119, p. 267, L. 1877; re-en. Sec. 119, 2nd Div. Rev. Stat. 1879; re-en. Sec. 119, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2551, C. Civ. Proc. 1895; re-en. Sec. 7494, Rev. C. 1907; re-en. Sec. 10130, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1444.

91-2203. (10131) Oath of appraisers and inventory. Before proceeding to the execution of their duty, the appraisers, before any officer authorized to administer oaths, must take and subscribe an oath, to be attached to the inventory, that they will truly, honestly, and impartially appraise the property exhibited to them, according to the best of their knowledge and ability. They must then proceed to estimate and appraise the property; each article must be set down separately, with the value thereof in dollars and cents, in figures, opposite to the articles, respectively; the inventory must contain all the estate of the decedent, real and personal, a statement of all debts, partnerships, and other interests, bonds, mortgages, notes, and other securities for the payment of money belonging to the decedent, specifying the name of the debtor in each security, the date, the sum originally payable, the indorsements thereon, if any, with their dates, and the sum which, in the judgment of the appraisers, may be collected on each debt, interest, or security.

History: En. Sec. 120, p. 267, L. 1877; re-en. Sec. 120, 2nd Div. Rev. Stat. 1879; re-en. Sec. 120, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2552, C. Civ. Proc. 1895; re-en. Sec. 7495, Rev. C. 1907; re-en. Sec. 10131, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1445.

References

In re Connolly's Estate, 73 M 35, 57, 235 P 408; In re Bierman's Estate, ___ M ___, 167 P 2d 350, 352.

Executors and Administrators 67, 68.
33 C.J.S. Executors and Administrators
§§ 132, 135.

91-2204. (10132) Inventory to account for moneys—if all money, no appraisal necessary. The inventory must also contain an account of all moneys belonging to the decedent which have come to the hands of the executor or administrator, and if none, the fact must be so stated in the inventory. If the whole estate consists of money, there need not be an appraisal, but an inventory must be made and returned as in other cases.

History: En. Sec. 121, p. 267, L. 1877; re-en. Sec. 121, 2nd Div. Rev. Stat. 1879; re-en. Sec. 121, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2553, C. Civ. Proc. 1895; re-en. Sec. 7496, Rev. C. 1907; re-en. Sec. 10132, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1446.

91-2205. (10133) Effect of naming a debtor executor. The naming of a person as executor does not thereby discharge him from any just claim which the testator has against him, but the claim must be included in the inventory, and the executor is liable for the same, as for such money in his hands, when the debt or demand becomes due.

History: En. Sec. 122, p. 268, L. 1877; re-en. Sec. 122, 2nd Div. Rev. Stat. 1879; re-en. Sec. 122, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2554, C. Civ. Proc. 1895; re-en. Sec. 7497, Rev. C. 1907; re-en. Sec. 10133, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1447.

Operation and Effect

An executor who held trust funds of the decedent in his possession at the time he qualified as such at once became liable therefor as for money in his hands, under this section, with interest thereon from the death of decedent, and by thereafter continuing to mingle the funds, as he had done theretofore, with his own moneys and using it in connection with his business until it was lost, he was bound to account for it with interest. In re Rodgers' Estate, 68 M 46, 53, 217 P 678.

An executor who was indebted to testator at the time of the latter's death was entitled to credit on settlement of his account for partial payments made by him while acting in his representative capacity, and the holding of the trial court that payments on account could not be made under this section, since thereunder the executor was liable for the whole debt as for money

in his hands and that the payments made were mere voluntary contributions, was error. In re Connolly's Estate, 73 M 35, 46 et seq., 235 P 408.

Id. Construing this section, which provides that an executor who was indebted to his testator at the time of the latter's death is liable for the amount owing as for money in his hands when the debt becomes due, held that the statute merely abrogates the common law rule whereby the bare appointment of an executor operated to extinguish any debt due from the executor to testator.

An executor who became indebted to his testator on his promissory note may not be held liable in his representative capacity upon his indebtedness to the decedent as for "money in hand" (this section) where during the progress of administration he can show that he was without means with which to make payment. In re Connolly's Estate, 79 M 445, 461, 257 P 418.

Executors and Administrators 50, 68.

33 C.J.S. Executors and Administrators §§ 101, 132.

91-2206. (10134) Debt or demand of testator not discharged by terms of will if necessary for payment of debts. The discharge or bequest in a will of any debt or demand of the testator against the executor named, or any other person, is not valid against the creditors of the decedent, but is a specific bequest of the debt or demand. It must be included in the inventory, and, if necessary, applied in the payment of the debts. If not necessary for that purpose, it must be paid in the same manner and proportion as other specific legacies.

History: En. Sec. 123, p. 268, L. 1877; re-en. Sec. 123, 2nd Div. Rev. Stat. 1879; re-en. Sec. 123, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2555, C. Civ. Proc. 1895; re-en. Sec. 7498, Rev. C. 1907; re-en. Sec. 10134, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1448.

Executors and Administrators 49, 68, 289 et seq.; Wills 753.

33 C.J.S. Executors and Administrators §§ 100, 132; 34 C.J.S. Executors and Administrators § 484; 69 C.J. Wills § 2081 et seq.

91-2207. (10135) To make oath to inventory. The inventory must be signed by the appraisers, and the executor or administrator must take and subscribe an oath before an officer authorized to administer oaths, that the inventory contains a true statement of all the estate of the decedent which has come to his knowledge and possession, and particularly of all money belonging to the decedent, and of all just claims of the decedent against the affiant. The oath must be indorsed upon or annexed to the inventory.

History: En. Sec. 124, p. 268, L. 1877; re-en. Sec. 124, 2nd Div. Rev. Stat. 1879; re-en. Sec. 124, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2556, C. Civ. Proc. 1895; re-en. Sec. 7499, Rev. C. 1907; re-en. Sec. 10135, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1449.

References

In re Connolly's Estate, 73 M 35, 57, 235 P 408.

91-2208. (10136) Revocation of letters and liability of representative for failure to make return. If an executor or administrator neglects or refuses to return the inventory within the time prescribed, or within such further time, not exceeding two months, which the court or judge shall, for reasonable cause, allow, the court or judge may, upon notice, revoke the letters testamentary or of administration, and the executor or administrator is liable on his bond for any injury to the estate, or any person interested therein, arising from such failure.

History: En. Sec. 125, p. 269, L. 1877; re-en. Sec. 125, 2nd Div. Rev. Stat. 1879; re-en. Sec. 125, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2557, C. Civ. Proc. 1895; re-en. Sec. 7500, Rev. C. 1907; re-en. Sec. 10136, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1450.

References

Cited or applied as section 7500, Revised

Codes, in State ex rel. King v. District Court, 42 M 182, 185, 111 P 717.

Executors and Administrators—35 (1), 73.

33 C.J.S. Executors and Administrators §§ 90, 140.

21 Am. Jur. 470, Executors and Administrators, § 176.

91-2209. (10137) Inventory of after-discovered property. Whenever property not mentioned in an inventory that is made and filed comes to the possession or knowledge of an executor or administrator, he must cause the same to be appraised in the manner prescribed in this chapter, and an inventory thereof to be returned within two months after the discovery; and the making of such inventory may be enforced, after notice, by attachment or removal from office.

History: En. Sec. 126, p. 269, L. 1877; re-en. Sec. 126, 2nd Div. Rev. Stat. 1879; re-en. Sec. 126, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2558, C. Civ. Proc. 1895; re-en. Sec. 7501, Rev. C. 1907; re-en. Sec. 10137, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1451.

Executors and Administrators—71.

33 C.J.S. Executors and Administrators § 134.

91-2210. (10138) Administrator and executor to possess real and personal estate. The executor or administrator is entitled to the possession of all the real or personal estate of the decedent, and to receive the rents and profits of the real estate until the estate is settled, or until delivered over by order of the court or judge to the heirs or devisees; and must keep in good tenable repair all houses, buildings, and fixtures thereon which are under his control. The heirs or devisees may themselves, or jointly with the executor or administrator, maintain an action for the possession of the real estate, or for the purpose of quieting title to or for partition of the same, against any one except the executor or administrator; but this section shall not be so construed as requiring them so to do.

History: En. Sec. 127, p. 269, L. 1877; re-en. Sec. 127, 2nd Div. Rev. Stat. 1879; re-en. Sec. 127, 2nd Div. Comp. Stat. 1887; amd. Sec. 2559, C. Civ. Proc. 1895; re-en. Sec. 7502, Rev. C. 1907; re-en. Sec. 10138, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1452.

same, against a trespasser. Black v. Story, 7 M 238, 242, 14 P 703. See also In re Higgins' Estate, 15 M 474, 485, 39 P 506; Kohn v. McKinnon, 90 Fed. 623, 626.

All of the Estate Goes Into Possession of Administrator or Executor

Administrator or Executor May Bring Action in Own Name as Such

An administrator has a right to the possession of the real estate of the decedent of whose estate he is administrator, and may bring ejectment in his own name as administrator, for the possession of the

The whole of the estate, both real and personal, goes into the possession of the executor or administrator, first for the payment of debts, and then for distribution under the will or the laws of succession. In re Tuohy's Estate, 33 M 230, 246, 83 P 486.

The administration of an estate is an entirety, and extends to the whole of the estate so far as its assets are within the jurisdiction where the appointment is made. The administrator has the exclusive right of control, subject to the orders of the district court for the purpose of administration. *Murphy v. Nett*, 51 M 82, 86, 149 P 713; *In re Smith's Estate*, 60 M 276, 297, 199 P 696.

Heirs May Recover Real Property Also

The right given to an administrator by section 91-3202 to maintain an action for the recovery of real property of his intestate (if applicable to an action to recover property sold by him under an order of sale) is not exclusive, this section conferring the same right upon the heirs. *Lamont v. Vinger*, 61 M 530, 537, 202 P 769.

Held, that devisees may maintain an action for damages for fraud practiced upon them in the procurement of an agreement to sell the real property of testator, even though at the time the estate was in process of administration and distribution had not been made. *Rumney et al. v. Skinner*, 64 M 75, 208 P 895.

Devisees may bring any proper action against any person (other than the executor in his official capacity) to either obtain possession of, quiet title to, or declare a trust in, any property devised to them, and in such an action the executor (or administrator) is neither a necessary nor an indispensable party. *In re Estate of Deschamps*, 65 M 207, 212 et seq., 212 P 512.

91-2211. (10139) Executor or administrator to deliver real estate to heirs or devisees, when. Unless it satisfactorily appears to the court or judge that the rents, issues, and profits of the real estate for a longer period are necessary to be received by the executor or administrator, wherewith to pay the debts of the decedent, or that it will probably be necessary to sell the real estate for the payment of such debts, the court or judge, at the end of the time limited for the presentation of claims against the estate, must direct the executor or administrator to deliver possession of all the real estate to the heirs at law or the devisees.

History: En. Sec. 128, p. 269, L. 1877; re-en. Sec. 128, 2nd Div. Rev. Stat. 1879; re-en. Sec. 128, 2nd Div. Comp. Stat. 1887; amd. Sec. 2560, C. Civ. Proc. 1895; re-en. Sec. 7503, Rev. C. 1907; re-en. Sec. 10139, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1453.

Operation and Effect

By the express provisions of this section it is the duty of the court, "at the end of the time limited for the presentation of claims against the estate," to direct the executor or administrator to de-

Right of Heirs to Dispose of Property—Limitations

Subject to the possession of a testator's estate by the executor for the purposes of administration, the devisees may at once sell or dispose of the property devised, or handle it as they desire. *In re Estate of Deschamps*, 65 M 207, 212 et seq., 212 P 512.

Title to Property

The property of a testator vests in the devisees from the moment of his death, subject to the right of the executor to its possession for the purposes of administration until the estate is settled or until it is delivered over to them by order of court, the decree of distribution simply releasing the property from the conditions it was subject to during the period of administration. *In re Estate of Deschamps*, 65 M 207, 212 et seq., 212 P 512.

References

In re Bradfield's Estate, 69 M 247, 260, 221 P 531; *In re Jennings' Estate*, 74 M 449, 455, 241 P 648; *Swanberg v. National Surety Co.*, 86 M 340, 353, 283 P 761; *State ex rel. Hills v. District Court*, ___ M ___, 169 P 2d 556, 559; *Murch v. Fellows*, ___ M ___, 167 P 2d 842, 843.

Descent and Distribution—§90 (1) et seq.; Executors and Administrators—§130, 132 et seq.; Wills—§747.

26 C.J.S. Descent and Distribution § 85; 33 C.J.S. Executors and Administrators §§ 233, 260; 69 C.J. Wills § 2700.

21 Am. Jur. 472, Executors and Administrators, §§ 181 et seq.

liver possession of all the real estate to the heirs at law or the devisees, unless it is necessary for him to hold the estate longer and to receive the rents, issues, and profits wherewith to pay the debts of the decedent. *In re Bradfield's Estate*, 69 M 247, 260, 221 P 531.

Under this section, when the time for the presentation of the claims against an estate has expired and all the debts of the decedent have been paid, the court is without discretion in the premises but must deliver the real property to the heirs

or devisees. In re McGovern's Estate, 77 M 182, 198, 250 P 812.

The fact that plaintiff executor in his action to quiet title may have been derelict in his duty to bring the estate matter to a speedy termination, and that the court failed to require him to deliver possession of all real property (converted into personal property as above recited), in obedience to this section, to the devisee (himself), could not affect his right to prosecute the action. Kern et al. v. Robertson, 92 M 283, 293, 12 P 2d 565.

Title Vests Immediately upon Death

Title to real and personal property of an

intestate passes by operation of law to, and immediately upon his death vests in, his heirs, subject to the control of the district court for purposes of administration. Gaines v. Van Demark, 106 M 1, 8, 74 P 2d 454.

References

In re Jennings' Estate, 74 M 449, 455, 241 P 648.

Executors and Administrators⇒130, 296.

33 C.J.S. Executors and Administrators § 257 et seq.; 34 C.J.S. Executors and Administrators § 487.

CHAPTER 23

PROCEDURE TO COMPEL DISCLOSURE OF PROPERTY OF ESTATE— LIABILITY FOR EMBEZZLEMENT

- Section 91-2301. Embezzling estate before grant of letters testamentary.
 91-2302. Citation to person suspected to have embezzled estate, etc.
 91-2303. Refusal to obey citation, penalty for, and for embezzlement—may be compelled to disclose by imprisonment—liable for double damages.
 91-2304. Persons entrusted with the estate of decedent may be cited to account.

91-2301. (10140) Embezzling estate before grant of letters testamentary. If any person, before the granting of letters testamentary or of administration, embezzles or alienates any of the moneys, goods, chattels, or effects of a decedent, he is charged therewith and liable to an action by the executor or administrator of the estate for double the value of the property so embezzled or alienated, to be recovered for the benefit of the estate.

History: En. Sec. 129, p. 270, L. 1877; re-en. Sec. 129, 2nd Div. Rev. Stat. 1879; re-en. Sec. 129, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2570, C. Civ. Proc. 1895; re-en. Sec. 7504, Rev. C. 1907; re-en. Sec. 10140, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1458.

"Penal Statute"—Not Applicable to Sale in Good Faith

This statute is a "penal statute" and hence will not be construed as subjecting to such liability one selling property in good faith, without intent to deprive de-

cedent's estate of value thereof, as in case of sale in good faith under power in chattel mortgage before appointment of administrator of deceased mortgagor's estate. Regional Agricultural Credit Corporation of Spokane, Wash. v. Chapman, 129 F 2d 435, 437, (38 F. Supp. 604 reversed).

Executors and Administrators⇒86, 540, 544.

33 C.J.S. Executors and Administrators § 167 et seq.; 34 C.J.S. Executors and Administrators §§ 1065, 1068.

91-2302. (10141) Citation to person suspected to have embezzled estate, etc. If any executor or administrator, or any person interested in the estate of a decedent, complains to the court or judge, on oath, that any person is suspected to have concealed, embezzled, smuggled, conveyed away, or disposed of any moneys, goods, or chattels of the decedent, or has in his possession or knowledge any deeds, conveyances, bonds, contracts, or other writings, which contain evidences of or tend to disclose the right, title, interest, or claim of the decedent to any real or personal estate, or any claim or demand, or any lost will, the said court or judge may cite such person to appear before such court, and may examine him on oath upon

the matter of such complaint. If such person is not in the county where such decedent dies, or where letters have been granted, he may be cited and examined either before the district court or judge of the county where the decedent dies, or where letters have been granted. But if he appears and is found innocent, his necessary expenses must be allowed him out of the estate.

History: En. Sec. 130, p. 270, L. 1877; re-en. Sec. 130, 2nd Div. Rev. Stat. 1879; re-en. Sec. 130, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2571, C. Civ. Proc. 1895; re-en. Sec. 7505, Rev. C. 1907; re-en. Sec. 10141, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1459.

Operation and Effect

A petition by an administrator for a citation requiring certain persons to appear and be examined is fatally defective in failing to allege that any of the persons cited had in their possession, or had knowledge of, any deeds or papers containing evidences of the right, title, or interest of the decedent to the property described in the petition. *State ex rel. Chapin v. District Court*, 35 M 318, 320, 89 P 62.

The provisions of this section and the following section are remedial in their nature, and confer power upon the court, when sitting in probate proceedings, analogous in its scope and object to the power of a court in chancery upon bills of discovery. The proceeding authorized by them is of an ancillary character, however, and is confined to securing a discovery of evidence upon which the administrator or executor may recover assets belonging to the estate which would otherwise be lost. In *re Roberts' Estate*, 48 M 40, 41, 135 P 909.

Funds of an estate expended by the administrator for attorney's fees are not recoverable on the theory that the attorney has property of the estate in his possession for which he may be called to account under this section and the following section; the jurisdiction of the court, sitting in probate, under these provisions extending no further than to require the accused to appear and submit to an examination, it having no power to adjudge rights which may be asserted or involved. *State ex rel. Cohen v. District Court*, 53 M 210, 213, 162 P 1053.

An order of the district court sitting in probate made pursuant to a citation to a former administrator under this and the following sections, to appear and be examined concerning his disposition of personal property belonging to the estate, cannot go further than require a disclosure to be used in an action pending or to be brought in behalf of the estate; it cannot finally adjudicate any right. *Baker v. Hanson et al.*, 72 M 22, 32, 231 P 902.

Executors and Administrators—85, 544.

33 C.J.S. Executors and Administrators § 153 et seq.; 34 C.J.S. Executors and Administrators § 1068.

91-2303. (10142) Refusal to obey citation, penalty for, and for embezzlement—may be compelled to disclose by imprisonment—liable for double damages. If the person so cited refuses to appear and submit to an examination, or to answer such interrogatories as may be put to him, touching the matters of the complaint, the court or judge may, by warrant for that purpose, commit him to the county jail, there to remain in close custody until he submits to the order of the court, or is discharged according to law. If, upon examination, it appears that he has concealed, embezzled, smuggled, conveyed away, or disposed of any moneys, goods, or chattels of the decedent, or that he has in his possession or knowledge any deeds, conveyances, bonds, contracts, or other writings containing evidence of or tending to disclose the right, title, interest, or claim of the decedent to any real or personal estate, claim, or demand, or any lost will of the decedent, the court or judge may make an order requiring such person to disclose his knowledge thereof to the executor or administrator, and may commit him to the county jail, there to remain until the order is complied with, or he is discharged according to law; and all such interrogatories and answers must be in writing, signed by the party examined, and filed in the court. The order for such disclosure made upon such examination

shall be prima facie evidence of the right of the executor or administrator to such property in any action brought for the recovery thereof; and any judgment recovered therein must be for double the value of the property as assessed by the court or jury, or for the return of the property and damages in addition thereto, equal to the value of such property. In addition to the examination of the party, witnesses may be produced and examined on either side.

History: En. Sec. 131, p. 271, L. 1877; re-en. Sec. 131, 2nd Div. Rev. Stat. 1879; re-en. Sec. 131, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2572, C. Civ. Proc. 1895; re-en. Sec. 7506, Rev. C. 1907; re-en. Sec. 10142, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1460.

Operation and Effect

The order authorized by this section can go no further than to require a disclosure which may be used in an action pending or to be brought in behalf of the estate. In *re Roberts' Estate*, 48 M 40, 42, 135 P 909.

An order of the district court sitting in probate made pursuant to a citation to a former administrator under this and the preceding sections, to appear and be examined concerning his disposition of personal property belonging to the estate,

cannot go further than require a disclosure to be used in an action pending or to be brought in behalf of the estate; it cannot finally adjudicate any right. *Baker v. Hanson et al.*, 72 M 22, 32, 34, 231 P 902.

References

Cited or applied as sec. 2572, Code of Civil Procedure, in *State ex rel. Chapin v. District Court*, 35 M 318, 319, 89 P 62; as sec. 7506, Revised Codes, in *State ex rel. Cohen v. District Court*, 53 M 210, 213, 162 P 1053.

Executors and Administrators—85 (6, 8), 544.

33 C.J.S. Executors and Administrators §§ 163, 165, 166; 34 C.J.S. Executors and Administrators § 1068.

91-2304. (10143) Persons entrusted with the estate of decedent may be cited to account. The court or judge, upon the complaint, on oath, of any executor or administrator, may cite any person who has been entrusted with any part of the estate of the decedent to appear before such court or judge, and require him to render a full account, on oath, of any moneys, goods, chattels, bonds, accounts, or other property or papers belonging to the estate, which have come to his possession in trust for the executor or administrator, and of his proceedings thereon; and if the person so cited refuses to appear and render such account, the court or judge may proceed against him as provided in the preceding section.

History: En. Sec. 132, p. 271, L. 1877; re-en. Sec. 132, 2nd Div. Rev. Stat. 1879; re-en. Sec. 132, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2573, C. Civ. Proc. 1895; re-en. Sec. 7507, Rev. C. 1907; re-en. Sec. 10143, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1461.

CHAPTER 24

PROVISION FOR SUPPORT OF FAMILY

- Section 91-2401. Widow and minor children may remain in decedent's house, etc.
 91-2402. All property exempt from execution to be set apart for use of family.
 91-2403. May make extra allowance.
 91-2404. Payment of allowance.
 91-2405. Property set apart—how apportioned between widow and children.
 91-2406. Estates not exceeding fifteen hundred dollars to go to widow and minor child or minor children—those not exceeding three thousand dollars to be summarily administered.
 91-2407. When all property, other than homestead, to go to children.

91-2401. (10144) Widow and minor children may remain in decedent's house, etc. When a person dies leaving a widow or minor children, the widow or children, until letters are granted and the inventory is returned,

are entitled to remain in possession of the homestead, of all the wearing apparel of the family, and of all the household furniture of the decedent, and are also entitled to a reasonable provision for their support, to be allowed by the court or judge.

History: En. Sec. 133, p. 272, L. 1877; re-en. Sec. 133, 2nd Div. Rev. Stat. 1879; re-en. Sec. 133, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2580, C. Civ. Proc. 1895; re-en. Sec. 7508, Rev. C. 1907; re-en. Sec. 10144, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1464.

Construed With Succeeding Section

This section and the two succeeding sections go hand in hand, and when an order is made in pursuance of them, all the findings of fact necessary to support it will be presumed. In *re Dougherty's Estate*, 34 M 336, 343, 86 P 38.

Formal Application for, Unnecessary

It would seem that a formal application for a widow's allowance is not required. In *re Dougherty's Estate*, 34 M 336, 343, 86 P 38.

Nature of Claim for Family Allowance

Moneys paid out of an estate for family allowance are charges against the estate created by special statutes in the interest of public policy. In *re Dougherty's Estate*, 34 M 336, 343, 86 P 38; In *re Blackburn's Estate*, 51 M 234, 237, 152 P 31.

The widow's allowance is not in the nature of an interest in the property of the decedent, but is merely a preferred claim against the estate in the nature of costs of administration—a demand on the ground of right. In *re Oppenheimer's Estate*, 73 M 560, 565 et seq., 238 P 599.

Notice of Allowance Unnecessary

The widow of an intestate being entitled to an allowance during the progress of settlement of the estate of deceased as a matter of right, under this section and sec. 91-2403, notice of the court's intention to make such allowance is not required. In *re Dougherty's Estate*, 34 M 336, 343, 86 P 38.

Payment of Family Allowance Without Order of Court

The fact that an administrator paid the widow of decedent a family allowance for the support of herself and minor child without a previous order of the court, thus rendering his conduct irregular, did not deprive him of the right to credit therefor on his final account upon a finding by the court that the amount paid was reasonable and proper, the court being clothed with power to approve his action. In *re Springer's Estate*, 79 M 256, 265, 255 P 1058.

Stipulation as to Family Allowance Binding

A stipulation by the parties made at the opening of a hearing on the re-examination of the accounts of an executrix that the court might pass upon all questions of family allowance both as to amount and time for which to be allowed, upon the evidence and all records and files in the case, debarred the unsuccessful party from attacking the order on appeal on the ground that it covered a period of time for which allowance should not have been made. In *re Eakins' Estate*, 64 M 84, 87, 208 P 956.

Time Over Which Family Allowance Is Reasonable

Held, in finding that eight and a half years was a reasonable time in which to close an estate valued at \$40,000 and granting a family allowance for that length of time, the court did not abuse its discretion where a contest of the will under which the executrix was acting was pending in the court for about three and a half years, where the estate was defendant in a number of other cases, some of which were at the time of the order still pending, and where the parties objecting to the allowance, her stepsons, lived at the home of the executrix and participated in the allowance. In *re Eakins' Estate*, 64 M 84, 87, 208 P 956.

Waiver of Allowance

Held, that where in an antenuptial agreement the wife released her dower rights in all of the real estate then owned or thereafter to be acquired by the husband, and all other rights, title, interest, property, claim and demand whatsoever at law or in equity in such real estate; assigned to him any claim she might be entitled to after becoming his wife or widow in any personal property then owned or which might be acquired by him thereafter, and agreed that in consideration of \$150,000 she would make no further claim against him or his estate for any share therein to which as his widow she might be entitled to, she thereby waived her right to an allowance for her support authorized by this section through section 91-2404, during administration of the deceased husband's estate. In *re Oppenheimer's Estate*, 73 M 560, 565 et seq., 238 P 599.

When Family Allowance Is Improper

Where at the time a petition for family

allowance was filed the estate was and had been for some time ready to be closed and a reasonable time had elapsed for the settlement of its affairs, the court abused its discretion in granting the petition. In re Trepp's Estate, 71 M 154, 163, 227 P 1005.

References

Swartz v. Smole, 91 M 90, 95, 5 P 2d 566; In re Wilson's Estate, 102 M 178, 196, 56 P 2d 733.

21 Am. Jur. 560-565, Executors and Administrators, §§ 314-323.

91-2402. (10145) All property exempt from execution to be set apart for use of family. Upon the return of the inventory, or any subsequent time during the administration, the court or judge may, on its own motion, or on petition therefor, set apart for the use of the surviving husband or wife, or, in case of his or her death, to the minor children of the decedent, all the property exempt from execution, including the homestead selected, designated and recorded; if no homestead has been selected, designated and recorded, the court or judge must select, designate and set apart, and cause to be recorded, a homestead for the use of the surviving husband or wife and the minor children; or if there be no surviving husband or wife, then for the use of the minor children, in the manner provided for in sections 91-2501 to 91-2507, out of the real estate belonging to the decedent. It shall be sufficient to entitle any person to receive the benefits of this section, under any court order hereafter made, if such person was a bona fide resident of the state of Montana, at the time of the death of decedent.

History: En. Sec. 134, p. 272, L. 1877; re-en. Sec. 134, 2nd Div. Rev. Stat. 1879; re-en. Sec. 134, 2nd Div. Comp. Stat. 1887; amd. Sec. 2581, C. Civ. Proc. 1895; re-en. Sec. 7509, Rev. C. 1907; re-en. Sec. 10145, R. C. M. 1921; amd. Sec. 1, Ch. 66, L. 1935. Cal. C. Civ. Proc. Sec. 1465.

Operation and Effect

Where a homestead was set apart to a widow by the probate court, it was immaterial whether it acted on petition or on its own motion. Bullerdick v. Hermes-meyer, 32 M 541, 549, 81 P 334.

The homestead authorized to be selected by the probate court under this section, where none was selected prior to the death of decedent, is the homestead provided for by secs. 33-101 to 33-104, and therefore the value and extent of it must not be any greater than as prescribed by those sections. In re Trepp's Estate, 71 M 154, 160 et seq., 227 P 1005.

This section, authorizing the district court or judge to set apart to a surviving husband or wife, or to the minor children of a decedent, all property exempt from execution, held, to be an exemption statute or one creating a preferred claim against the estate of a deceased person, and not one of succession or inheritance. In re

Right of nonresident to widow's or child's allowance out of estate of one who was domiciled in state. 26 ALR 132.

Who included in term "family" in statute relating to family allowance out of decedent's estate. 65 ALR 273.

Widow's or family allowance out of decedent's estate as surviving death or marriage of widow or minor children, or attainment of majority by children. 144 ALR 270.

Particular articles within statute giving to surviving spouse or children certain specific items of personal property of deceased. 158 ALR 313.

Metcafe's Estate, 93 M 542, 543 et seq., 19 P 2d 905.

Id. The right to have exempt property set aside for the support of a minor child of a deceased person may be waived.

Id. Exemption statutes, such as sec. 93-5814, and this section, are primarily intended for the protection of the home as well as for the protection of the state, which is interested in the welfare of the homes within its confines and the throwing of safeguards about them.

Id. Decedent's minor child, living with her divorced mother in another state, through her guardian ad litem petitioned the district court that the proceeds of certain life insurance policies be set aside as exempt property, under this section—an exemption statute. Section 93-5814 provides that moneys derived from life insurance of the debtor shall be exempt, but that no person not a bona fide resident of the state shall have the benefit of the exemption. Held, that petitioner, being a nonresident, was not entitled to an order granting the petition.

References

Cited or applied as sec. 2581, Code of Civil Procedure, in In re Dougherty's Es-

tate, 34 M 336, 343, 86 P 38; as sec. 7509, Revised Codes, in *Kerlee v. Smith*, 46 M 19, 21, 124 P 777; In re Estate of Bruhns, 58 M 526, 529, 193 P 1114; In re Eakins' Estate, 64 M 84, 87, 208 P 956; In re Oppenheimer's Estate, 73 M 560, 565 et seq., 238 P 599.

Executors and Administrators 173 et seq.; Homestead 150 et seq.

34 C.J.S. Executors and Administrators §§ 323, 324 et seq.; 40 C.J.S. Homesteads § 279 et seq.

91-2403. (10146) May make extra allowance. If the amount set apart be insufficient for the support of the widow and children, or either, the court or judge must make such reasonable allowance out of the estate as shall be necessary for the maintenance of the family, according to their circumstances, during the progress of the settlement of the estate, which, in case of an insolvent estate, must not be longer than one year after granting letters testamentary or of administration.

History: En. Sec. 135, p. 273, L. 1877; re-en. Sec. 135, 2nd Div. Rev. Stat. 1879; re-en. Sec. 135, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2582, C. Civ. Proc. 1985; re-en. Sec. 7510, Rev. C. 1907; re-en. Sec. 10146, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1466.

Operation and Effect

A widow can claim the allowance herein mentioned only for such length of time as is reasonably necessary to settle the estate. In re Dougherty's Estate, 34 M 336, 343, 86 P 38.

Held, in finding that eight and a half years was a reasonable time in which to close an estate valued at \$40,000, and granting a family allowance for that length of time, the court did not abuse its discretion where a contest of the will under which the executrix was acting was pending in the court for about three and a half years, where the estate was defendant in a number of other cases, some of which were at the time of the order still pending, and where the parties objecting to the allowance, her stepsons, lived at the home

of executrix and participated in the allowance. In re Eakins' Estate, 64 M 84, 87, 208 P 956.

Where at the time a petition for family allowance was filed the estate was and had been for some time ready to be closed and a reasonable time had elapsed for the settlement of its affairs, the court abused its discretion in granting the petition. In re Trepp's Estate, 71 M 154, 163, 227 P 1005.

References

Cited or applied as sec. 7510, Revised Codes, in In re Blackburn's Estate, 51 M 234, 237, 152 P 31; In re Oppenheimer's Estate, 73 M 560, 565 et seq., 238 P 599; In re Springer's Estate, 79 M 256, 265, 255 P 1058; In re Metcalf's Estate, 93 M 542, 549, 19 P 2d 905; In re Wilson's Estate, 102 M 178, 188, 56 P 2d 733.

Executors and Administrators 196.

34 C.J.S. Executors and Administrators § 363.

91-2404. (10147) Payment of allowance. Any allowance made by the court or judge, in accordance with the provisions of this chapter, must be paid in preference to all other charges, except funeral charges and expenses of administration; and any such allowance, whenever made, may, in the discretion of the court or judge, take effect from the death of the decedent.

History: En. Sec. 136, p. 273, L. 1877; re-en. Sec. 136, 2nd Div. Rev. Stat. 1879; re-en. Sec. 136, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2583, C. Civ. Proc. 1895; re-en. Sec. 7511, Rev. C. 1907; re-en. Sec. 10147, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1467.

Operation and Effect

The widow's allowance is not in the nature of an interest in the property of the decedent, but is merely a preferred claim against the estate in the nature of costs of administration, a demand on the ground of

right. In re Oppenheimer's Estate, 73 M 560, 565, 238 P 599.

References

Cited or applied as sec. 7511, Revised Codes, in In re Blackburn's Estate, 51 M 234, 237, 152 P 31; In re Trepp's Estate, 71 M 154, 160, 227 P 1005; Gaer v. Bank of Baker, 111 M 204, 209, 107 P 2d 877.

Executors and Administrators 195-201.

34 C.J.S. Executors and Administrators §§ 362-366.

91-2405. (10148) Property set apart—how apportioned between widow and children. When property is set apart for the use of the family, in accordance with the provisions of this chapter, if the decedent left a widow or surviving husband, and no minor child, such property is the property of the widow or surviving husband. If the decedent left also a minor child or children, the one-half of such property shall belong to the widow or surviving husband, and the remainder to the child, or in equal shares to the children, if there be more than one. If there be no widow or surviving husband, the whole belongs to the minor child or children. If the property set apart be a homestead, selected from the separate property of the deceased, the court or judge can only set it apart for a limited period, to be designated in the order, which shall be a life estate to husband or wife, and the title vests in the heirs of the deceased, subject to such order.

History: En. Sec. 137, p. 274, L. 1877; re-en. Sec. 137, 2nd Div. Rev. Stat. 1879; re-en. Sec. 137, 2nd Div. Comp. Stat. 1887; amd. Sec. 2584, C. Civ. Proc. 1895; re-en. Sec. 7512, Rev. C. 1907; re-en. Sec. 10148, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1468.

Operation and Effect

The purpose of the legislature in enacting this statute was to preserve to the heirs of the decedent the fee of the real property belonging to his separate estate, but subject to a life estate carved out of it in favor of the surviving husband or wife. Thus the latter is vested with a life estate in the whole property, which may be alienated as could be the fee under the old statute. *Kerlee v. Smith*, 46 M 19, 22, 124 P 777.

References

Cited or applied as sec. 7512, Revised Codes, in *In re Estate of Bruhns*, 58 M 526, 529, 58 M 1114.

Executors and Administrators—180, 195 et seq.; Homestead—140-152.

34 C.J.S. Executors and Administrators §§ 324, 336, 362; 40 C.J.S. Homesteads § 259 et seq.

21 Am. Jur. 560-565, Executors and Administrators, §§ 314-323.

Widow's or family allowance out of decedent's estate as surviving death or marriage of widow or minor children, or attainment of majority by children. 144 ALR 270.

91-2406. (10149) Estates not exceeding fifteen hundred dollars to go to widow and minor child or minor children—those not exceeding three thousand dollars to be summarily administered. (1) If, on the return of the inventory of the estate of an intestate, it appears that the value of the whole estate does not exceed the sum of fifteen hundred dollars (\$1,500.00), the court or judge, by an order of distribution for that purpose, must assign, set over and distribute to the widow for the use and support of herself and minor child or minor children, if there be a widow and minor child or minor children, and if there be no minor children, then for the use and support of the widow, and if no widow, then to the minor child or minor children, if there is or are any, for his or their use and support, the whole of the estate, including the fee simple title to the real estate, if any, after the payment of the expenses of his last illness, funeral charges, and expenses of the administration, subject to whatever mortgages, liens or encumbrances there may be upon said estate at the time of the death of the deceased, and there must be no further proceedings in the administration, unless further estate be discovered.

(2) When it so appears that the value of the whole estate does not exceed the sum of three thousand dollars (\$3,000.00), and the expenses of his last illness, funeral charges, and expenses of administration, as well as

all other debts of the estate, have been paid, it is in the discretion of the court or judge, by an order for that purpose after notice to all persons interested to appear on a day fixed to show cause why such order should not be made, to assign the whole of the estate to the widow and minor child or minor children, if there be a widow and minor child or minor children, and if there be no children then to the widow, and if no widow then to the minor child or minor children, in the same manner as above provided in the case where the value of the whole estate does not exceed the sum of fifteen hundred dollars (\$1,500.00), and in such case also the title thereof shall vest absolutely in such widow and minor child or minor children, subject to whatever mortgages, liens or encumbrances there may be upon said estate at the time of the death of deceased. The notice to creditors must be given to present their claims within four (4) months after the first publication of such notice, and those not so presented are barred as in other cases.

History: En. Sec. 138, p. 274, L. 1877; re-en. Sec. 138, 2nd Div. Rev. Stat. 1879; re-en. Sec. 138, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2585, C. Civ. Proc. 1895; re-en. Sec. 7513, Rev. C. 1907; re-en. Sec. 10149, R. C. M. 1921; amd. Sec. 1, Ch. 57, L. 1941. Cal. C. Civ. Proc. Sec. 1469.

Operation and Effect

Where the aggregate value of an estate consisting of property in Montana and another state exceeds fifteen hundred dollars, though the value of the property in each state is less than fifteen hundred dollars, in the latter of which the whole estate has been set aside for the widow under a similar section, the children are not entitled to have a distribution of the property upon the basis of the aggregate value, so that the amount which the widow had received in the other state could be de-

ducted from her distributive share in Montana. In re Estate of Bruhns, 58 M 526, 528, 193 P 1114.

Under this section, the district court sitting in probate may, after the issuance of letters of administration, dispense with the regular proceedings in estate matters prescribed by secs. 91-701 to 91-5211, where an estate does not exceed the sum of \$3000, and hence may in such a case in its discretion dispense with all the provisions of secs. 91-1601 to 91-1604, relating to revocation of letters. In re Esterly's Estate, 97 M 206, 210, 34 P 2d 539.

Executors and Administrators—7, 178, 225.

33 C.J.S. Executors and Administrators § 11; 34 C.J.S. Executors and Administrators §§ 1056-1061.

91-2407. (10150) When all property, other than homestead, to go to children. If the widow has a maintenance derived from her own property equal to the portion set apart to her by the preceding sections of this chapter, the whole property so set apart, other than the homestead, must go to the minor children.

History: En. Sec. 139, p. 274, L. 1877; re-en. Sec. 139, 2nd Div. Rev. Stat. 1879; re-en. Sec. 139, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2586, C. Civ. Proc. 1895; re-en. Sec. 7514, Rev. C. 1907; re-en. Sec. 10150, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1470.

References

In re Wilson's Estate, 102 M 178, 196, 56 P 2d 733.

Executors and Administrators—180.

34 C.J.S. Executors and Administrators §§ 324, 336.

CHAPTER 25

THE HOMESTEAD—PROCEDURE TO SET APART

- Section 91-2501. Rights of survivor to homestead.
 91-2502. Selected and recorded homestead set apart to persons entitled—subsisting liens to be paid by solvent estate.

- 91-2503. Appraisers to carve out of the original, exceeding twenty-five hundred dollars in value, a homestead, and report the same.
 91-2504. Report of the appraisers—majority and minority, which may be confirmed.
 91-2505. Day to be set for rejecting or confirming the report of the appraisers—reappraisal.
 91-2506. Costs—to whom chargeable—persons succeeding to rights of homestead owners have all their powers and rights.
 91-2507. Certified copies of certain orders to be recorded.

91-2501. (10151) Rights of survivor to homestead. If the homestead selected by the husband or wife, or either of them, during their coverture, and recorded while both were living, was selected from the separate property of the person selecting or joining in the selection of the same, it vests, on the death of the husband or wife, in the survivor for life.

History: En. Sec. 2590, C. Civ. Proc. 1895; re-en. Sec. 7515, Rev. C. 1907; re-en. Sec. 10151, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1474.

Homestead \Rightarrow 140, 141.

40 C.J.S. Homesteads §§ 260, 265.

26 Am. Jur. 115, Homestead, §§ 185 et seq.

References

In re Trepp's Estate, 71 M 154, 160, 227 P 1005.

91-2502. (10152) Selected and recorded homestead set apart to persons entitled—subsisting liens to be paid by solvent estate. If the homestead selected and recorded prior to the death of the decedent be returned in the inventory appraised at not exceeding twenty-five hundred dollars in value, or was previously appraised as provided in Title 33, and such appraised value did not exceed that sum, the court or judge must, by order, set it off to the persons in whom title is vested by the preceding sections. If there be subsisting liens or encumbrances on the homestead, the claims secured thereby must be presented and allowed as other claims against the estate. If the funds of the estate be adequate to pay all claims against the estate, the claims so secured must be paid out of such funds. If the funds of the estate be not sufficient for that purpose, the claims so secured shall be paid proportionately, with other claims allowed, and the liens or encumbrances on the homestead shall only be enforced against the homestead for any deficiency remaining after such payment.

History: En. Sec. 141, p. 274, L. 1877; re-en. Sec. 141, 2nd Div. Rev. Stat. 1879; re-en. Sec. 141, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2591, C. Civ. Proc. 1895; re-en. Sec. 7516, Rev. C. 1907; re-en. Sec. 10152, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1475.

References

In re Trepp's Estate, 71 M 154, 160, 227 P 1005.

Homestead \Rightarrow 150-152.

40 C.J.S. Homesteads §§ 267-270, 278-283.

91-2503. (10153) Appraisers to carve out of the original, exceeding twenty-five hundred dollars in value, a homestead, and report the same. If the homestead, as selected and recorded, be returned in the inventory appraised at more than twenty-five hundred dollars, the appraisers must, before they make their return, ascertain and appraise the value of the homestead at the time the same was selected, and if such value exceeded twenty-five hundred dollars, or if the homestead was appraised as provided in Title 33, and such appraised value exceeded that sum, the appraisers must determine whether the premises can be divided without material injury, and if they find that they can be thus divided, they must ad-

measure and set apart to the persons entitled thereto such portion of the premises, including the dwelling-house, as will amount in value to the sum of twenty-five hundred dollars, and make report thereof, giving the metes, bounds, and full description of the portion set apart as a homestead. If the appraisers find that the premises exceeded in value, at the time of their selection, the sum of twenty-five hundred dollars, and that they cannot be divided without material injury, they must report such finding, and thereafter the court or judge may make an order for the sale of the premises and the distribution of the proceeds to the parties entitled thereto. Such order of sale must state in what manner the sale shall be conducted, and what notice must be given thereof, and on the return of the sales to the court or judge, and after distribution of the proceeds, the executor or administrator must give a deed of the premises to the purchaser. The proceeds shall be distributed as follows: The liens or encumbrances must be first paid, subject to the provisions hereinbefore stated, and then twenty-five hundred dollars to the persons entitled thereto, and the balance, if any, must be paid into the funds of the estate.

History: Ap. p. Sec. 142, p. 275, L. 1877; re-en. Sec. 142, 2nd Div. Rev. Stat. 1879; re-en. Sec. 142, 2nd Div. Comp. Stat. 1887; en. Sec. 2592, C. Civ. Proc. 1895; re-en. Sec. 7517, Rev. C. 1907; re-en. Sec. 10153, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1476.

References

In re Trepp's Estate, 71 M 154, 160, 227 P 1005.

91-2504. (10154) Report of the appraisers—majority and minority, which may be confirmed. Any two of the appraisers concurring may discharge the duties imposed upon the three, and make the report. A dissenting report may be made by the third appraiser. The report must state fully the acts of the appraisers. Both reports may be heard and considered by the court or judge in determining a confirmation or rejection of the majority report, but the minority report must in no case be confirmed.

History: En. Sec. 143, p. 275, L. 1877; re-en. Sec. 143, 2nd Div. Rev. Stat. 1879; re-en. Sec. 143, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2593, C. Civ. Proc. 1895; re-en. Sec. 7518, Rev. C. 1907; re-en. Sec. 10154, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1477.

References

In re Trepp's Estate, 71 M 154, 160, 227 P 1005.

91-2505. (10155) Day to be set for rejecting or confirming the report of the appraisers—reappraisal. When the report of the appraisers is filed, the court or judge must set a day for hearing any objections thereto, from anyone interested in the estate. Notice of hearing must be given for such time, and in such manner, as the court or judge may direct. If the court or judge be satisfied that the report is correct, it must be confirmed, otherwise rejected. In case the report is rejected, the court or judge may appoint new appraisers to examine and report upon the homestead, and similar proceedings may be had for the confirmation or rejection of their report, as upon the first report.

History: En. Sec. 144, p. 275, L. 1877; re-en. Sec. 144, 2nd Div. Rev. Stat. 1879; re-en. Sec. 144, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2594, C. Civ. Proc. 1895; re-en. Sec. 7519, Rev. C. 1907; re-en. Sec. 10155, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1478.

References

In re Trepp's Estate, 71 M 154, 160, 227 P 1005.

91-2506. (10156) Costs—to whom chargeable—persons succeeding to rights of homestead owners have all their powers and rights. The costs of all proceedings provided for in this chapter must be paid by the estate as expenses of administration. Persons succeeding by purchase or otherwise to the interests, rights, and title of successors to homesteads, or to the right to have homesteads set apart to them, as in this chapter provided, have all the rights and benefits conferred by law on the persons whose interests and rights they acquire.

History: En. Sec. 145, p. 276, L. 1877; re-en. Sec. 145, 2nd Div. Rev. Stat. 1879; re-en. Sec. 145, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2595, C. Civ. Proc. 1895; re-en. Sec. 7520, Rev. C. 1907; re-en. Sec. 10156, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1485.

References

In re Trepp's Estate, 71 M 154, 160, 227 P 1005.

91-2507. (10157) Certified copies of certain orders to be recorded. A certified copy of every order made in pursuance of this chapter, by which a report is confirmed, property assigned, or sale confirmed, must be recorded in the office of the county clerk of the county where the homestead property is situated.

History: En. Sec. 146, p. 276, L. 1877; re-en. Sec. 146, 2nd Div. Rev. Stat. 1879; re-en. Sec. 146, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2596, C. Civ. Proc. 1895; re-en. Sec. 7521, Rev. C. 1907; re-en. Sec. 10157, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1486.

References

In re Trepp's Estate, 71 M 154, 160, 227 P 1005.

CHAPTER 26

DOWER—PROCEDURE TO ASSIGN

- Section 91-2601. Dower to be assigned widow.
 91-2602. Widow may sue for dower if not set off.
 91-2603. How widow may sue, and proceedings.
 91-2604. Trial of right contested.
 91-2605. Guardians to be appointed for minors.
 91-2606. Judgment for widows to be entered.
 91-2607. Appointment of commissioners, and oath.
 91-2608. Duties of commissioners, and reports.
 91-2609. If lands cannot be divided, widow's interest may be appraised by a jury.
 91-2610. Judgment for yearly value or gross sum.
 91-2611. Damages for withholding dower.
 91-2612. Writ of possession may be issued.

91-2601. (10158) Dower to be assigned widow. It is the duty of the heirs-at-law, or other person in possession or having the next estate of freehold, or inheritance, in any lands or estate of which the widow is entitled to dower, to lay off and assign such dower as soon as practicable after the death of the husband of such widow.

History: Secs. 10158-10169, R. C. M. 1921, en. as Secs. 10-24, pp. 66-69, L. 1876; omitted from Rev. Stat. 1879 and C. Civ. Proc. 1887.

This section re-en. Sec. 3070, C. Civ. Proc. 1895; re-en. Sec. 7817, Rev. C. 1907; re-en. Sec. 10158, R. C. M. 1921.

Operation and Effect

The district court, in the exercise of its

probate jurisdiction, has no power with reference to dower, and can make no orders affecting a widow's dower right. In re Dahlman's Estate, 28 M 379, 380, 72 P 750.

References

Cited or applied as sec. 3070, Code of Civil Procedure, in Dahlman v. Dahlman,

28 M 373, 374, 72 P 748; Swartz v. Smole, Dower 65 et seq.
 91 M 90, 96, 5 P 2d 566. 28 C.J.S. Dower §§ 79, 80 et seq.
 17 Am. Jur. 766, Dower, § 112.

91-2602. (10159) Widow may sue for dower if not set off. If such heirs or other person do not, within one month next after the decease of the husband, assign and set over to the widow to her satisfaction, her dower in and to all lands, tenements, and hereditaments, whereof by law she is or may be dowable, then such widow may sue for and recover the same in the manner hereinafter prescribed against such heirs or other person having the next immediate estate of freehold or inheritance, or tenant in possession, or other person or persons claiming rights or possession in said estate.

History: Secs. 10158-10169, R. C. M. 1921, en. as Secs. 10-24, pp. 66-69, L. 1876; omitted from Rev. Stat. 1879 and C. Civ. Proc. 1887. This section re-en. Sec. 3071, C. Civ. Proc. 1895; re-en. Sec. 7818, Rev. C. 1907; re-en. Sec. 10159, R. C. M. 1921.

17 Am. Jur. 766, Dower, §§ 111 et seq.

91-2603. (10160) How widow may sue, and proceedings. Every widow claiming dower may file her complaint in the district court of the proper county, against the parties aforesaid, stating their names, if known, setting forth the nature of her claim, and particularly specifying the lands, tenements, and hereditaments in which she claims dower, and praying that the same may be allowed to her, whereupon the clerk must issue a summons, and the pleadings and proceedings must be as in other cases.

History: Secs. 10158-10169, R. C. M. 1921, en. as Secs. 10-24, pp. 66-69, L. 1876; omitted from Rev. Stat. 1879 and C. Civ. Proc. 1887. Proc. 1895; re-en. Sec. 7819, Rev. C. 1907; re-en. Sec. 10160, R. C. M. 1921.

This section re-en. Sec. 3072, C. Civ. Dower 71, 72, 77, 78.
 28 C.J.S. Dower §§ 86, 87, 91, 92.

91-2604. (10161) Trial of right contested. Where the right of the widow or dower is contested, the court must try the case or direct an issue for that purpose, as the circumstances may require.

History: Secs. 10158-10169, R. C. M. 1921, en. as Secs. 10-24, pp. 66-69, L. 1876; omitted from Rev. Stat. 1879 and C. Civ. Proc. 1887. Proc. 1895; re-en. Sec. 7820, Rev. C. 1907; re-en. Sec. 10161, R. C. M. 1921.

This section re-en. Sec. 3073, C. Civ. Dower 80.
 28 C.J.S. Dower § 94.

91-2605. (10162) Guardians to be appointed for minors. When any of the parties defendant are minors and without guardians, the court must appoint guardians ad litem for such minors.

History: Secs. 10158-10169, R. C. M. 1921, en. as Secs. 10-24, pp. 66-69, L. 1876; omitted from Rev. Stat. 1879 and C. Civ. Proc. 1887. Proc. 1895; re-en. Sec. 7821, Rev. C. 1907; re-en. Sec. 10162, R. C. M. 1921.

This section re-en. Sec. 3074, C. Civ. Infants 78 (1).
 43 C.J.S. Infants § 107 et seq.

91-2606. (10163) Judgment for widows to be entered. When the court adjudges that the widow is entitled to dower, it must be so entered of record, together with a description of the land out of which she is to be endowed.

History: Secs. 10158-10169, R. C. M. 1921, en. as Secs. 10-24, pp. 66-69, L. 1876; omitted from Rev. Stat. 1879 and C. Civ. Proc. 1887.

This section re-en. Sec. 3075, C. Civ. Dower⁸¹, 108.
 Proc. 1895; re-en. Sec. 7822, Rev. C. 1907; 28 C.J.S. Dower §§ 85, 95, 106.
 re-en. Sec. 10163, R. C. M. 1921.

91-2607. (10164) Appointment of commissioners, and oath. The court must thereupon appoint three commissioners not connected with any of the parties by consanguinity or affinity, and entirely disinterested, each of whom must take the following oath: "I do solemnly swear that I will fairly and impartially allot and set off to A B, widow of C D, her dower out of lands and tenements described in the order of the court for that purpose, if the same can be made consistent with the interest of the estate, according to the best of my judgment, so help me God," which must be filed in the proceedings.

History: Secs. 10158-10169, R. C. M. 1921, en. as Secs. 10-24, pp. 66-69, L. 1876; This section re-en. Sec. 3076, C. Civ. Proc. 1895; re-en. Sec. 7823, Rev. C. 1907; omitted from Rev. Stat. 1879 and C. Civ. re-en. Sec. 10164, R. C. M. 1921.
 Proc. 1887.

91-2608. (10165) Duties of commissioners, and reports. The commissioners, after being so sworn, must, as soon as may be, set off the dower by metes and bounds, according to the quantity and quality of all the lands, tenements, and hereditaments, described in said order, and make return in writing with the amount of their charges and expenses to the court, and the same being accepted and recorded, and a certified copy thereof recorded in the office of the county clerk of the county where the lands are situated, remain fixed and certain, unless such confirmation is set aside and reversed on appeal. The costs of such proceedings may be awarded in the discretion of the court.

History: Secs. 10158-10169, R. C. M. 1921, en. as Secs. 10-24, pp. 66-69, L. 1876; Proc. 1895; re-en. Sec. 7824, Rev. C. 1907; omitted from Rev. Stat. 1879 and C. Civ. re-en. Sec. 10165, R. C. M. 1921.
 Proc. 1887. Dower⁸², 97-99.
 This section re-en. Sec. 3077, C. Civ. 28 C.J.S. Dower §§ 85, 97, 105.

91-2609. (10166) If lands cannot be divided, widow's interest may be appraised by a jury. If the commissioners report that the lands or other estate is not susceptible of division without great injury thereto, a jury must be impaneled to inquire of the yearly value of the widow's dower therein, and assess the same accordingly.

History: Secs. 10158-10169, R. C. M. 1921, en. as Secs. 10-24, pp. 66-69, L. 1876; Proc. 1895; re-en. Sec. 7825, Rev. C. 1907; omitted from Rev. Stat. 1879 and C. Civ. re-en. Sec. 10166, R. C. M. 1921.
 Proc. 1887. Dower⁸⁴ et seq.; Jury¹⁹ (1).
 This section re-en. Sec. 3078, C. Civ. 28 C.J.S. Dower § 102; 50 C.J.S. Juries § 68.

91-2610. (10167) Judgment for yearly value or gross sum. The court must thereupon render a judgment that there be paid to such widow as an allowance in lieu of dower, on a day therein named, the sum so assessed as the yearly value of her dower, and the like sum on the same day in every year thereafter during her natural life. The widow may at any time consent to a gross sum to be paid to her for her dower in her deceased husband's estate, or the jury may find in lieu of a yearly allowance a gross sum to be paid to the widow, and the court may award a judgment for the same.

History: Secs. 10158-10169, R. C. M. 1921, en. as Secs. 10-24, pp. 66-69, L. 1876; omitted from Rev. Stat. 1879 and C. Civ. Proc. 1887.

This section re-en. Sec. 3079, C. Civ. Proc. 1895; re-en. Sec. 7826, Rev. C. 1907; re-en. Sec. 10167, R. C. M. 1921.

91-2611. (10168) Damages for withholding dower. Whenever in an action brought for the purpose, the widow recovers the dower in lands of which her husband died seized, she may also recover damages for the withholding of such dower; such damages shall be one-third part of the annual value of the mere profits of the land in which she so recovers her dower, to be estimated in an action against the heirs of her husband from the time of his death; and in actions against other persons, from the time of her demanding dower of such persons, but such damages must not be estimated for the use of any permanent improvements made after the death of her husband, by his heirs or any other person after claiming title to any lands.

History: Secs. 10158-10169, R. C. M. 1921, en. as Secs. 10-24, pp. 66-69, L. 1876; omitted from Rev. Stat. 1879 and C. Civ. Proc. 1887.

This section re-en. Sec. 3080, C. Civ. Proc. 1895; re-en. Sec. 7827, Rev. C. 1907; re-en. Sec. 10168, R. C. M. 1921.

Operation and Effect

Where real property of a decedent was sold by his executor without regard to the

widow's dower therein, she in an action against the purchaser to compel assignment of dower to her, was under this section entitled to one-third of the rental value thereof from the date of demand therefor upon the purchaser. *Swartz v. Smole*, 91 M 90, 96, 5 P 2d 566.

Dower⇒105, 106.

28 C.J.S. Dower § 77.

See 17 Am. Jur. 774, Dower, § 119.

91-2612. (10169) Writ of possession may be issued. In all cases where the report of the commissioners assigning dower is approved, the court must forthwith cause the widow to have possession by a writ directed to the sheriff for that purpose.

History: Secs. 10158-10169, R. C. M. 1921, en. as Secs. 10-24, pp. 66-69, L. 1876; omitted from Rev. Stat. 1879 and C. Civ. Proc. 1887.

This section re-en. Sec. 3081, C. Civ. Proc. 1895; re-en. Sec. 7828, Rev. C. 1907; re-en. Sec. 10169, R. C. M. 1921.

Civil Procedure, in State ex rel. *Heinze v. District Court*, 28 M 227, 233, 72 P 613; *Dahlman v. Dahlman*, 28 M 373, 374, 72 P 748.

Dower⇒109.

28 C.J.S. Dower § 107.

References

Cited or applied as sec. 3081, Code of

CHAPTER 27

CLAIMS AGAINST ESTATE

- Section 91-2701. Notice to creditors—additional notice—when notice unnecessary.
 91-2702. Time expressed in the notice.
 91-2703. Copy and proof of notice to be filed and order made.
 91-2704. Time within which claims against an estate to be presented.
 91-2705. Claims to be sworn to, and, when allowed, to bear same interest as judgment.
 91-2706. Judge may present claim, and action thereon.
 91-2707. Allowance and rejection of claims.
 91-2708. Approved claims or copies to be filed—claims secured by liens may be described—lost claims.
 91-2709. Limitation of actions on rejected claim.
 91-2710. Claims barred by statute of limitations—when and whom judge may examine.
 91-2711. Claims must be presented before suit.

- 91-2712. Effective date.
- 91-2713. Time of limitation.
- 91-2714. Claims in action pending at time of decease.
- 91-2715. Allowance of claim in part.
- 91-2716. Effect of judgment against executor or administrator.
- 91-2717. Execution not to issue after death—if one is levied the property may be sold.
- 91-2718. What judgment is not a lien on real property of an estate.
- 91-2719. May refer doubtful claims—effect of referee's allowance or rejection.
- 91-2720. Trial by referee—how confirmed and its effect.
- 91-2721. Liability of executor or administrator for costs.
- 91-2722. Claims of executor or administrator against the estate.
- 91-2723. Executor or administrator neglecting to give notice to creditors to be removed.
- 91-2724. Executor or administrator to return statement of claims.
- 91-2725. Payment of debt to stop running of interest.

91-2701. (10170) Notice to creditors—additional notice—when notice unnecessary. Every executor or administrator must, immediately after his appointment, cause to be published in some newspaper in the county, if there be one, if not, then in such newspaper as may be designated by the court or judge, a notice to the creditors of the decedent, requiring all persons having claims against him to exhibit them, with the necessary vouchers, to the executor or administrator, at the place of his residence or business, to be specified in the notice; such notice must be published as often as the court or judge shall direct, but not less than once a week for four weeks; the court or judge may also direct additional notice by publication or posting. In case such executor or administrator resigns, or is removed, before the time expressed in the notice, his successor must give notice only for the unexpired time allowed for such presentation; provided, that in estates where the value of the property is less than the preferred claims against said estate, or in estates wherein the property thereof has been or is set apart to the surviving widow and/or children as provided by law, in which cases no notice to creditors need be given.

History: En. Sec. 147, p. 276, L. 1877; re-en. Sec. 147, 2nd Div. Rev. Stat. 1879; re-en. Sec. 147, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2600, C. Civ. Proc. 1895; re-en. Sec. 7522, Rev. C. 1907; re-en. Sec. 10170, R. C. M. 1921; amd. Sec. 1, Ch. 162, L. 1935. Cal. Civ. C. Proc. Sec. 1490.

Operation and Effect

Claims against the estate are those in existence at the date of the death of the deceased. Other claims against an estate are those incurred by the administrator or executor in settling the estate, and are properly denominated expenses of administration. *Dodson v. Nevitt*, 5 M 518, 520, 6 P 358; *First National Bank v. Collins*, 17 M 433, 438, 43 P 499. See also *In re Williams' Estate*, 47 M 325, 330, 132 P 421.

The notice to creditors of an estate prescribed by this section, and required to be published by the executor or administrator, is in the nature of a process, and its requirements must be complied with in all

essentials. *Roche Valley Land Co. v. Barth et al.*, 67 M 353, 356, 215 P 654.

Id. This section provides that the executor or administrator of an estate shall publish a notice to the creditors of the estate to present their claims to him "at the place of his residence or business, to be specified in the notice." The notice published by defendant executor was to the effect that claims should be presented "to the executor" of decedent's estate "at the city of Billings" without specifying his place of residence or business. Held, under the above rule that the notice was insufficient, and that the court's holding that plaintiff's claim was barred because not presented within the period for presentation fixed in the notice was error.

A notice to creditors of an estate that claims against it were to be presented "at the office of F. S. P. Foss, Glendive, Montana," a city with a population considerably under 5,000, who acted as attorney for the estate, held not insufficient to meet the requirement of this section, that the place of residence or business of the per-

son to whom the claim is to be presented must "be specified in the notice." State v. District Court, 90 M 281, 290, 1 P 2d 335.

References

Cited or applied as sec. 7522, Revised Codes, in Smith v. Smith, 224 F. 1, 4, 139 C. C. A. 465; State v. District Court et al.,

76 M 143, 147, 245 P 529; Hornbeck et al. v. Richards, 80 M 27, 32, 257 P 1025; In re Harper's Estate, 98 M 356, 40 P 2d 51; State ex rel. Finley v. District Court, 99 M 200, 43 P 2d 682; Mathey v. Mathey, 109 M 467, 472, 98 P 2d 373.

21 Am. Jur. 592, Executors and Administrators, § 372.

91-2702. (10171) Time expressed in the notice. The time expressed in the notice must be ten months after its first publication when the estate exceeds in value the sum of ten thousand dollars, and four months when it does not.

History: En. Sec. 148, p. 276, L. 1877; re-en. Sec. 148, 2nd Div. Rev. Stat. 1879; re-en. Sec. 148, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2601, C. Civ. Proc. 1895; re-en. Sec. 7523, Rev. C. 1907; re-en. Sec. 10171, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1491.

Operation and Effect

Until the period of ten months has elapsed, in the case of an estate of the value specified in this section, no final decree can be entered that there are no debts. In re Higgins' Estate, 15 M 474, 487, 39 P 506.

Id. Where creditors have never had the requisite notice to present claims against the estate of a decedent, the ex parte affidavits of persons interested in the

estate to the effect that there are no debts cannot be taken as sufficient proof to enable a court in a judicial decree to find the fact to be as stated by the affiants.

References

Cited or applied as sec. 7523, Revised Codes, in Smith v. Smith, 224 F. 1, 11, 139 C. C. A. 465; State v. District Court et al., 76 M 143, 147, 245 P 529; In re Harper's Estate, 98 M 356, 40 P 2d 51; State ex rel. Steinfort v. District Court, 111 M 216, 221, 107 P 2d 890.

Executors and Administrators—225, 226.

34 C.J.S. Executors and Administrators § 411.

91-2703. (10172) Copy and proof of notice to be filed and order made. After the notice is given, as required by the preceding section, a copy thereof, with the affidavit of due publication, or of publication and posting, must be filed, and upon such affidavit or other testimony to the satisfaction of the court or judge, an order showing that due notice to creditors has been given, and directing that such order be entered in the minutes and recorded, must be made by the court or judge.

History: En. Sec. 149, p. 276, L. 1877; re-en. Sec. 149, 2nd Div. Rev. Stat. 1879; re-en. Sec. 149, 2nd Div. Comp. Stat. 1887; amd. Sec. 2602, C. Civ. Proc. 1895; re-en. Sec. 7524, Rev. C. 1907; re-en. Sec. 10172, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1492.

91-2704. (10173) Time within which claims against an estate to be presented. All claims arising upon contracts, whether the same be due, not due, or contingent, must be presented within the time limited in the notice, and any claim not so presented is barred forever; provided, however, that when it is made to appear by the affidavit of the claimant, to the satisfaction of the court or judge, that the claimant had no notice as provided in this chapter, by reason of being out of the state, it may be presented at any time before an order of distribution is entered; and, provided, further, that nothing in this chapter contained shall be so construed as to prohibit the right, or limit the time, of foreclosure of mortgages upon real property of decedents, whether heretofore or hereafter executed, but every such mortgage may be foreclosed within the time and in the manner prescribed by the provisions of this code, other than those of

this chapter, except that no balance of the debt secured by such mortgage remaining unpaid after foreclosure shall be a claim against the estate unless such debt was presented as required by the provisions of this chapter.

History: En. Sec. 150, p. 277, L. 1877; re-en. Sec. 150, 2nd Div. Rev. Stat. 1879; re-en. Sec. 150, 2nd Div. Comp. Stat. 1887; amd. Sec. 2603, C. Civ. Proc. 1895; re-en. Sec. 7525, Rev. C. 1907; re-en. Sec. 10173, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1493.

Applicable Only to an Estate in Course of Administration

Held, on application for writ of supervisory control, that where after the estate of a deceased person had been distributed, the holder of a real estate mortgage executed by decedent during his lifetime commenced suit to foreclose without asking for a deficiency judgment, the sole heir not answering, the district court erred in dismissing the suit for want of jurisdiction because of plaintiff's failure to allege that he had presented his claim to the administrator or, in the absence of presentation of such claim, that he waived all recourse against the decedent's property other than that covered by the mortgage, since the provisions of this section and 91-2711 are applicable only to an estate still in course of administration and not to one that has been closed. *State v. District Court et al.*, 76 M 143, 146 et seq., 245 P 529.

Applicable Only to Claims Existing at Time of Death

Held, that this section, providing that claims against a decedent's estate arising upon contracts, whether due, not due or contingent, are barred unless presented to the executor within the time limited in the notice to creditors, and sec. 91-2711 declaring that a creditor cannot maintain suit on his claim (excepting a mortgage debt or claim for funeral expenses) unless so presented, have reference only to indebtedness of the deceased contracted by him in his lifetime and existent at the time of death, and therefore have no application to obligations arising subsequent to his death by reason of breach of an executory contract, such latter obligation becoming by operation of law that of his personal representative. *Nathan v. Freeman et al.*, 70 M 259, 266 et seq., 225 P 1015.

Plaintiff, brother of decedent, who had paid the operating expenses for the preservation of estate property, held entitled to reimbursement although he had not filed a claim against the estate for such advances as required of a creditor whose claim is based upon a liability existing during the lifetime of the decedent. *Gas-*

par v. Buckingham, 116 M 236, 245, 153 P 2d 892.

Approved Claims May Become Barred by Creditors' Laches, But Never by Statutory Limitations

Where banks having approved claims against an estate delayed for over 21 years after admission of decedent's will to probate and appointment of the executor before filing their petition for sale of estate property, held, that in view of all the facts and circumstances presented, the creditors voluntarily abandoned any right given them by statute to sell the estate property at probate sale, and that their claims were barred by laches; held further, that statutes of limitations have no application to creditors' claims approved by the personal representative and allowed by the court. *Montgomery v. First National Bank of Dillon*, 114 M 395, 405, 412, 136 P 2d 760.

Claim of Surviving Partner Must be Presented as Herein Required

Where a partnership is dissolved by death, and upon liquidation of its affairs, or in course thereof, it appears that the deceased partner was indebted to the survivor in an amount over and above the partnership assets, the latter must present his claim for allowance under the provisions of this section. *Mares v. Mares et al.*, 60 M 36, 55, 199 P 267; *Link v. Haire*, 82 M 406, 419, 267 P 952.

Claims of Executor Against Estate Must be Presented as Herein Required

A claim of an executor against the estate in his charge must be presented for allowance within the same time as the claims of other creditors, and if not so presented is barred under the provisions of this section. In *re Rodgers' Estate*, 68 M 46, 54, 217 P 678.

Id. Held, under the preceding rule, that where an executor neither in the inventory and appraisal nor in his accounts prior to final settlement of the estate had mentioned an alleged indebtedness of decedent to him for taking care of his cattle and paying taxes thereon, and his claim for reimbursement was not made until long after the time for presenting claims had expired and not until his final account was ordered re-opened at the instance of the heirs, it was error to allow such items as an offset against the amount for which he was accountable.

Effect of Failure of Holder of Mortgage to Present Claim

Where the holder of a mortgage on property of a decedent fails to present his claim against the latter's estate within the time specified in the statute, he can no longer have recourse against the estate other than the property described in the mortgage, the debt then losing its characteristic as a debt of the deceased, and when all claims presented and allowed have been paid, the estate is ready for distribution despite the fact that the mortgage remains unpaid. *Mathey v. Mathey*, 109 M 467, 472, 98 P 2d 373.

Estate Ceases to Exist Upon Entry Decree of Distribution

The estate of a deceased person dealt with by this section and section 91-2711, the intent of which is to permit a mortgagee to foreclose his mortgage although the mortgagor has died, provided the mortgagee shall not have recourse against any other property of the decedent's estate unless he first presents his mortgage claim to the executor or administrator in accordance with the statute, ceases to exist upon entry of decree of distribution which is conclusive and has the force of res adjudicata; after the estate is declared closed the court has neither jurisdiction over the property of the estate nor the executor or administrator. *State v. District Court et al.*, 76 M 143, 146 et seq., 245 P 529.

Excusable Failure of Nonresident Claimant to Present Claim to Ancillary Administrator No Bar to Presentation to Domiciliary Representative

Where a creditor of an estate resided in California, in which state ancillary administration was granted, but was ignorant of the death of the administrator of the estate of the debtor during the time in which claims against the estate could be presented in that state, he was not estopped from presenting it to the domiciliary representative in Montana under the provision of this section, authorizing its presentation under such state of facts at any time before order of distribution is entered, there being no privity between the two administrations. *State ex rel. Finley v. District Court*, 99 M 200, 205, 43 P 2d 682.

Identical Claim Must be Presented or It Will be Barred

If the identical claim sued upon was not presented to the executor or administrator, it is forever barred. *Vanderpool v. Vanderpool*, 48 M 448, 455, 138 P 772.

Mandatory Statute

The requirements of this section, that

presentation of claims against an estate arising upon contracts must be made within the time limited in the notice to creditors, else they are forever barred, and of sec. 91-2708, that if claims be founded upon writings, copies thereof must accompany them, are mandatory, and if not observed the executor or administrators may reject the claims. *State v. District Court et al.*, 90 M 281, 286, 1 P 2d 335.

Not Applicable to State Hospital Claim for Care Based on Court Order and Statutory Authority

The statute of nonclaim (this section) is limited to contract obligations and does not include one imposed by statute. Held, in action by state against administrator of estate of person confined in state hospital at private expense by court order under authority of sec. 38-214, presentation of claim was not required as a prerequisite to right to bring action. *State v. Pahnish*, 116 M 340, 342, 151 P 2d 1001.

Not Applicable to Tort Claims

This section is limited to claims arising on contract; it does not apply to a claim against the estate of a deceased guardian, for having, in his lifetime, misappropriated the money of his ward. *Smith v. Smith*, 224 F. 1, 4, 139 C. C. A. 465.

Held, that the statutes of nonclaim which bar claims against an estate or its executor or administrator unless first presented for allowance, and, if rejected, suit brought within three months after rejection, cover only such claims as came into existence by contract, express or implied, prior to the death of the decedent, and therefore do not apply to claims for unliquidated damages arising for a tort committed by the decedent in his lifetime. *Hornbeck et al. v. Richards*, 80 M 27, 32, 257 P 1025.

Operation in General

These statutes of nonclaim, such as this section, are special in character; they supersede the general statutes of limitations, and compliance with their requirements is essential to the foundation of any right of action against an estate upon a cause of action which sounds in contract. *Vanderpool v. Vanderpool*, 48 M 448, 454, 138 P 772; *Davis v. Estate of Davis*, 56 M 500, 510, 185 P 559.

Power of Sale May be Exercised Without Reference to the Estate

A trustee in a trust deed given as security for the payment of a debt, and authorizing him to sell the property after default, may, after the death of the grantor, exercise the power of sale without reference to the administration of the

grantor's estate. *Muth v. Goddard*, 28 M 237, 255, 72 P 621.

Probate Court Refusing to Permit Nonresident to Present Claim Against Estate—Writ of Supervisory Control Lies

There being no appeal from an order of the district court sitting in probate refusing to permit a nonresident to present a claim, based on a promissory note of a decedent, to the executor for allowance after the time for presenting claims had expired, on the ground that petitioner did not have notice of the death of the maker, or the administration of the estate, the petition being based upon this section, the writ of supervisory control lies to review the action of the court. *State ex rel. Finley v. District Court*, 99 M 200, 204, 43 P 2d 682.

Sufficiency of a Complaint to Foreclose a Mortgage Against an Estate

Where the complaint in an action against an administrator to foreclose a mortgage executed by the decedent does not allege a presentation of the claim, it should allege that plaintiff waives all recourse against the other property of the estate. *Jones v. Rich*, 20 M 289, 292, 50 P 936.

When Amendment Permitted after Time Expires

Under the rule that amendment of a claim after expiration of filing time should be permitted where it effects no substantial change in the claim as a basis of recovery, held, that where a creditor filed a claim based on two promissory notes, leave should have been granted him to amend to show the dates and amounts of interest payments made thereon at such times as to prevent the running of the statute of limitations, the total of the claim being left the same as it appeared on the original claim filed, the amendment showing a credit to the estate. *State ex rel. Steinfert v. District Court*, 109 M 410, 414, 97 P 2d 341.

When Inapplicable to a Foreign Claim

A resident of California died, leaving real estate in Montana. Administration with the will annexed was there had and an ancillary administrator appointed in Montana. A creditor in California reduced his claim to judgment but the estate proved insufficient to pay it. There were no debts in Montana. In answer to an order requiring the ancillary administrator to present his final report with a petition for final distribution, the domiciliary administrator petitioned that the Montana administrator be required to reduce to cash the property in this state and

transmit same, after payment of expenses, etc., to him. The claim of the creditor was not filed with Montana administrator and the time for filing it had expired. Held, that, under the circumstances, the statutes of nonclaim (this section and 91-2710) were inapplicable, and that the court properly directed transmittal of the funds to the California administrator. *In re Livingston's Estate*, 91 M 584, 9 P 2d 159.

When Statute of Nonclaim Inapplicable

This statute, providing that unless claims against estates are presented within a specified time they are forever barred, does not apply to a claim arising out of an alleged agreement of decedent to make a will bequeathing a specified sum of money to one in consideration of services rendered to decedent during her lifetime. *Erwin v. Mark*, 105 M 361, 370, 73 P 2d 537.

Where Partnership Property in Possession of Administrator

Where the administrator, under probate court order and guidance, had, contrary to sec. 91-3205 taken over and assumed to administer the partnership property, plaintiff instituted suit against the administrator to establish a partnership between himself and deceased to establish his right to one-half of the assets of such business, together with funds he advanced for administration purposes, all of which was awarded in a money judgment. *Gaspar v. Buckingham*, 116 M 236, 248, 153 P 2d 892.

Id. Held, that the complaint in above action not defective for failing to allege that the claim had been presented to the administrator or that plaintiff had made an accounting, since the action involved a transaction by defendant administrator after decedent's death rather than the partnership operation prior to death, nor was money claimed due from decedent at his death to which this statute refers involved, nor could plaintiff be expected to account for defendant's management of partnership property solely within defendant's knowledge.

References

Cited or applied as sec. 7525, Revised Codes, in *Emerson-Brantingham I. Co. v. Anderson*, 58 M 617, 628, 194 P 160; *Nevin-Frank Co. v. Hubert*, 67 M 50, 54, 214 P 959; *Roche Valley Land Co. v. Barth et al.*, 67 M 353, 356, 215 P 654; *Wunderlich v. Holt*, 86 M 260, 269, 283 P 423; *Mitchell v. Banking Corp. of Montana*, 94 M 165, 169 et seq., 22 P 2d 175; *Leffek v. Luedeman*, 95 M 457, 469, 27 P 2d 511; *State ex rel. Steinfert v. District Court*, 111 M 216, 221, 107 P 2d 890.

Executors and Administrators \Rightarrow 225.

34 C.J.S. Executors and Administrators § 405 et seq.

21 Am. Jur. 890-894, Executors and Administrators, §§ 924-927.

Effect of conduct of personal representative preventing filing of claim within time allowed by statute of nonclaim. 11 ALR 246.

Necessity of presenting claim to executor or administrator before bringing suit. 34 ALR 362.

Applicability of nonclaim statute in case of misappropriation or fraudulent breach of trust by decedent. 41 ALR 169.

Effect of recovery of judgment on un-

filed or abandoned claim after expiration of time allowed for filing claim against estate. 60 ALR 736.

Necessity of presenting, probating, or presecuting claims for allowance as affected by provision of will directing payment of debt. 65 ALR 861.

Sufficiency of notice of claim against decedent estate. 74 ALR 368.

Nonclaim statute as applied to real estate mortgage or mortgage debt. 78 ALR 1126.

Claim on decedent's contract of guaranty, suretyship, or indorsement as contingent within statute of nonclaim. 94 ALR 1155.

91-2705. (10174) Claims to be sworn to, and, when allowed, to bear same interest as judgment. Every claim which is due, when presented to the executor or administrator, must be supported by the affidavit of the claimant, or some one in his behalf, that the amount is justly due, that no payments have been made thereon which are not credited, and that there are no offsets to the same, to the knowledge of the affiant. If the claim be not due when presented, or be contingent, the particulars of such claim must be stated. When the affidavit is made by a person other than the claimant, he must set forth in the affidavit the reason why it is not made by the claimant. The oath may be taken before any officer authorized to administer oaths. The executor or administrator may also require satisfactory vouchers or proofs to be produced in support of the claim. If the estate be insolvent, no greater rate of interest shall be allowed upon any claim after the first publication of notice to creditors than is allowed on judgments obtained in the district court.

History: En. Sec. 151, p. 277, L. 1877; re-en. Sec. 151, 2nd Div. Rev. Stat. 1879; re-en. Sec. 151, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2604, C. Civ. Proc. 1895; re-en. Sec. 7526, Rev. C. 1907; re-en. Sec. 10174, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1494.

Defective Verifications

Where the affidavit in verification of a claim against an estate omitted to set forth that no payments had been made thereon which were not credited as required by this section, it was ineffectual as a basis of legal liability against it, and neither itemization of the claim, in the shape of debits and credits, nor the statement that the claim was lawful, just, true and correct, nor the vouchers and proofs which may be required by the executor or administrator, could supply the defect. *The Ullman Co. v. Adler*, 59 M 232, 234, 237, 196 P 157.

Id. In an action by a corporation on a claim against an estate which had been disallowed by the administratrix, the ruling that it was improperly verified, inasmuch as its bookkeeper made the affidavit required by this section, without setting

forth the reason why the claimant himself did not make it, was correct, the recital that the claimant is a corporation being insufficient to cure the defect.

Purpose of Affidavit

The affidavit called for by this section, to accompany a claim against an estate, is not required as evidence of the existence of the debt, but as evidence of good faith to prevent the presentation of spurious or fictitious claims. *The Ullman Co. v. Adler*, 59 M 232, 234, 237, 196 P 157; *Mitchell v. Banking Corp. of Montana*, 94 M 165, 179, 22 P 2d 175.

Substantial Compliance Necessary

There must be a substantial compliance with the requirements of every provision of this section, specifying what the verification of a claim against the estate of the decedent must contain; where there is no such compliance, the claim is ineffectual as a basis for legal liability. *The Ullman Co. v. Adler*, 59 M 232, 234, 237, 196 P 157. See also *Nevin-Frank Co. v. Hubert*, 67 M 50, 54. 214 P 959.

Sufficiency of Affidavits Made by Persons Other Than the Claimant

The provision of this section, that the affidavit supporting a claim against a decedent's estate, when made by another than claimant, shall set forth the reason why it is not made by claimant, is satisfied by an affidavit, made by one of claimant's attorneys, stating that claimant is a corporation, and none of its officers except its said attorneys reside in the county. *Empire State Min. Co. v. Mitchell*, 29 M 55, 58, 74 P 81.

When claimant acts for himself, the word "claimant" in the affidavit accompanying the claim meets all the requirements of this section; but, when some one acts in behalf of claimant, the statement must be "to the knowledge of the affiant." *Dorais v. Doll*, 33 M 314, 317, 83 P 884.

Verification of Claim by a Corporation

Held, that where the claim of a corporation against an estate as presented to the executrix was otherwise sufficient, the fact that the verification made by its president in its behalf did not contain the statement that the claimant was a corporation, a fact admitted at the trial by defendant executrix, did not render it fatally defective. *Nevin-Frank Co. v. Hubert*, 67 M 50, 54, 214 P 959.

91-2706. (10175) Judge may present claim, and action thereon. Any judge of the district court may present a claim against the estate of a decedent for allowance to the executor or administrator thereof, and if the executor or administrator allows the claim, he must in writing designate some judge of the district court of an adjoining county or district, who, upon the presentation of such claim to him, is vested with power to allow or reject it, and the judge presenting such claim, in case of its rejection by the executor or administrator, or by such judge as shall have acted upon it, has the same right to sue in a proper court for its recovery as other persons have when their claims against an estate are rejected.

History: En. Sec. 152, p. 277, L. 1877; re-en. Sec. 152, 2nd Div. Rev. Stat. 1879; re-en. Sec. 152, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2605, C. Civ. Proc. 1895; re-en. Sec. 7527, Rev. C. 1907; re-en. Sec. 10175, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1495.

91-2707. (10176) Allowance and rejection of claims. When a claim, accompanied by the affidavit required in this chapter, is presented to the executor or administrator, he must indorse thereon his allowance or rejection, with the day and date thereof. If he allow the claim, it must be presented to the judge for his approval, who must in the same manner indorse upon it his allowance or rejection. If the executor or administrator, or the judge, refuse or neglect to indorse such allowance or rejection for ten days after the claim has been presented to him, such refusal or

Verification of Claim by Guardian

Where a claim against an estate showed on its face that it was made by claimant as guardian, the fact that the verification required by this section was made by him individually without any reference to his official capacity as guardian did not render the claim fatally defective. In re *Stinger Estate*, 61 M 173, 187, 201 P 693.

Vouchers Are Not a Condition Precedent to the Allowance of a Claim

This section does not make the furnishing of vouchers a condition precedent to the allowance of a claim. The executor or administrator may require satisfactory vouchers in his discretion. *Jones v. Rich*, 20 M 289, 292, 50 P 936.

References

Cited or applied as sec. 2604, Code of Civil Procedure, in *Harrington v. Butte & Boston Min. Co.*, 35 M 530, 531, 90 P 748; *Burnett v. Neraal*, 67 M 189, 190, 191, 214 P 955; *State v. Yellowstone Bank etc. Co.*, 75 M 43, 50, 243 P 813; *Hornbeck et al. v. Richards*, 80 M 27, 32, 257 P 1025; *Wunderlich v. Holt*, 86 M 260, 269, 283 P 423; *State ex rel. Steinfert v. District Court*, 109 M 410, 412, 97 P 2d 341.

Executors and Administrators⇒227, 416.
34 C.J.S. Executors and Administrators
§§ 416 et seq., 685.

Executors and Administrators⇒228 (2),
236 et seq., 429.

33 C.J.S. Executors and Administrators
§ 267; 34 C.J.S. Executors and Administrators
§§ 410, 428, 435, 693.

neglect may, at the option of the claimant, be deemed equivalent to a rejection on the tenth day; and if the presentation be made by a notary, the certificate of such notary, under seal, shall be prima facie evidence of such presentation, and the date thereof. If the claim be presented to the executor or administrator before the expiration of the time limited for the presentation of claims, the same is presented in time, though acted upon by the executor or administrator, and by the judge, after the expiration of such time.

History: En. Sec. 153, p. 278, L. 1877; re-en. Sec. 153, 2nd Div. Rev. Stat. 1879; re-en. Sec. 153, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2606, C. Civ. Proc. 1895; re-en. Sec. 7528, Rev. C. 1907; re-en. Sec. 10176, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1496.

Cross-Reference

Attachment of interests in estates, sec. 93-4307.

Claims Separately Rejected Cannot be Sued on Jointly

Where a party and his wife, in an action against the executrix of an estate for the breach of an agreement, entered into with them by decedent, to pay them jointly a certain sum of money, alleged that each had presented to the executrix a separate claim for half the money sued for, and that the claims had been rejected, the plaintiffs, never having presented a joint claim against the estate, could not maintain a joint action based upon the presentation and rejection of their separate claims. *Brown v. Daly*, 33 M 523, 528, 84 P 883.

Duty of Creditors to Ascertain Whether or Not Claim Was Allowed

Creditors of estates, after presentation of their claims, must make inquiry as to the action taken by executor, administrator, or the district judge with reference to them, in order to preserve their rights in case of rejection, the statute, while requiring each to indorse thereon his allowance or rejection, with the day and date thereof, not making it the duty of either to notify claimants of their rejection. *Lindsay v. Hogan*, 56 M 583, 586, 185 P 1118.

Operation and Effect on General Limitations

Under the provisions of this section and of section 91-2709, a creditor is not given three months after the rejection of his claim by the administrator of an estate within which to begin action thereon, even though the claim was rejected after the time limited for presentation, if otherwise barred by the general statute of limitations, although filed within the time limited for the presentation of claims, and

before the bar of the statute had fallen. *Davis v. Estate of Davis*, 56 M 500, 507, 185 P 559.

What is a Sufficient Rejection of a Claim

The presentation of a claim against an estate at the office of the attorney of the estate, in accordance with a published notice to creditors, and the indorsement of the claim by the attorney, under the direction of the administrator, as having been "rejected," and signing the administrator's name, constitute a sufficient compliance with this section. *Dorais v. Doll*, 33 M 313, 318, 83 P 884.

When Claim May be Acted Upon by Executor

When a claim against an estate is presented before the time limited for its presentation has expired, it may nevertheless be acted upon by the administrator or executor, after the expiration of that period. *Davis v. Estate of Davis*, 56 M 500, 511, 185 P 559.

When Proper to Present Claim

The notice to creditors required by law is for the convenience of the creditors, and there is nothing in the statute to prevent a creditor from presenting a claim as soon as the administrator is appointed and qualified. *Davis v. Estate of Davis*, 56 M 500, 507, 185 P 559.

Id. Creditors of an estate may present their claims for payment before formal notice for presentation of claims is given, or if no notice at all is given, the administrator or executor, when qualified, having authority to pass upon claims against the estate in either event.

References

Cited or applied as sec. 2606, Code of Civil Procedure, in *Jones v. Rich*, 20 M 289, 291, 50 P 936; *State v. Yellowstone Bank etc. Co.*, 75 M 43, 50, 243 P 813; *Mitchell v. Banking Corp. of Montana*, 94 M 165, 179, 22 P 2d 175; *State ex rel. Finley v. District Court*, 99 M 200, 43 P 2d 682; *Pierce v. Pierce*, 108 M 42, 46, 89 P 2d 269; *State ex rel. Steinfert v. District Court*, 109 M 410, 417, 97 P 2d 341;

State ex rel. Steinfert v. District Court, 111 M 216, 222, 107 P 2d 890.

Executors and Administrators—234, 236.
34 C.J.S. Executors and Administrators
§§ 426, 428, 435.

21 Am. Jur. 576-602, Executors and Administrators, §§ 341-388.

Power and responsibility of executor or administrator in respect of waiver or compromise of claim to estate. 85 ALR 176.

Right of executor or administrator to settle or compromise action or cause of

action for death; and power of probate court to authorize such settlement. 103 ALR 445.

Who entitled to contest, or appeal from, allowance of claim against decedent's estate. 118 ALR 743.

Return or tender of consideration for relief or compromise of interest in decedent's estate as condition of action for rescission or cancelation, action upon original claim, or action for damages sustained by the fraud inducing the release or compromise. 134 ALR 164.

91-2708. (10177) Approved claims or copies to be filed—claims secured by liens may be described—lost claims. Every claim allowed by the executor or administrator, and approved by the judge, or a copy thereof, as hereinafter provided, must, within thirty days thereafter, be filed in the court, and be ranked among the acknowledged debts of the estate, to be paid in due course of administration. If the claim be founded on a bond, bill, note, or other instrument, a copy of such instrument must accompany the claim, and the original instrument must be exhibited, if demanded, unless it be lost or destroyed, in which case the claimant must accompany his claim by his affidavit, containing a copy or particular description of such instrument, and stating its loss or destruction. If the claim, or any part thereof, be secured by a mortgage or other lien which has been recorded in the office of the county clerk of the county in which the land affected by it lies, it shall be sufficient to describe the mortgage or lien, and refer to the date, volume, and page of its record. If, in any case, the claimant has left an original voucher in the hands of the executor or administrator, or suffered the same to be filed in court, he may withdraw the same when a copy thereof has been already, or is then, attached to his claim. A brief description of every claim filed must be entered by the clerk in the register, showing the name of the claimant, the amount and character of the claim, rate of interest, and date of allowance.

History: En. Sec. 154, p. 278, L. 1877; re-en. Sec. 154, 2nd Div. Rev. Stat. 1879; re-en. Sec. 154, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2607, C. Civ. Proc. 1895; re-en. Sec. 7529, Rev. C. 1907; re-en. Sec. 10177, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1497.

Cross-References

Payment of debts of estate, order of payment, secs. 91-3601 to 91-3611.

Wages as preferred claim against employer's estate, sec. 45-603.

Claims Not Liens Against Property of Estate

Claims against the estate of a deceased person, duly approved, are not liens on the property of the estate, and no execution for their enforcement can issue. They are merely acknowledged debts payable in the course of administration. *Montgomery v. First National Bank of Dillon*, 114 M 395, 405, 136 P 2d 760.

Operation and Effect

The allowance of a claim against an estate and its approval by the district judge does not render such claim a final judgment so as to protect it from attack by protest against the allowance of the administrator's final account. In *re Mouillera's Estate*, 14 M 245, 250, 36 P 185.

A claim against an estate is not "founded on a bond, bill, note, or other instrument," within the meaning of this section, where it appears to be due upon an oral agreement, the result of which is an account stated. *Dorais v. Doll*, 33 M 314, 318, 33 P 884.

Compliance with the provisions of this section involves no difficulty, and a court cannot say that anything less than substantial compliance upon the part of the claimant meets the requirements. *Vanderpool v. Vanderpool*, 48 M 448, 452, 138 P 772.

Under this section, a claim against the estate of a decedent founded upon a prom-

issory note which is neither lost nor destroyed must be accompanied either by the original note or a copy of it when presented to the executor or administrator for allowance; where not so accompanied the claim may properly be rejected. *Burnett v. Neraal*, 67 M 189, 191, 192, 214 P 955.

Where a creditor of an estate presents his claim to the administrator who approves it and it is thereupon approved by the district court, the claim, filed in court, is an acknowledged debt of the estate having the same force as a judgment rendered against the administrator (this section and 91-2716), and the lien secured by attachment in an action against decedent which at the time of her death had not proceeded to judgment is thereby perfected to the amount approved. In *re Stevenson*, 87 M 486, 495, 289 P 566.

The requirements of sec. 91-2704, that presentment of claims against an estate arising upon contracts must be made within the time limited in the notice to creditors, else they are forever barred, and of this section, that if claims be founded upon writings, copies thereof must accompany them, are mandatory, and if not observed the executor or administrator

may reject the claims. *State v. District Court et al.*, 90 M 281, 286, 1 P 2d 335.

When Permissible to Amend by Attaching Copy of Contract

Held, where claim of corporation filed with executor without copy of contract attached, but executor had a copy in his possession, the court erred in refusing permission to claimant to file an amended claim with copy of contract attached after time for filing claims had expired and the claim had been disallowed, the only material change in the claim consisting of attaching such copy, the purpose of the requirement being merely to better enable the executor to pass upon the merits of the claim. *State ex rel. Montana Flour Mills Co. v. District Court*, 110 M 55, 58, 99 P 2d 213.

References

Cited or applied as sec. 2607, Code of Civil Procedure, in *Jones v. Rich*, 20 M 289, 291, 50 P 936; *Mitchell v. Banking Corp. of Montana*, 94 M 165, 179, 22 P 2d 175.

21 Am. Jur. 576-602, Executors and Administrators, §§ 341-388.

91-2709. (10178) Limitation of actions on rejected claim. When a claim is rejected, either by the executor or administrator, or the judge, the executor shall within ten (10) days thereafter, file such rejected claim with the clerk of court. Upon the filing of a rejected claim, the clerk of court shall, within three days thereafter, mail a notice of said rejection to the claimant, at his address as designated in said claim, and he shall file an affidavit of such mailing. The claimant must bring suit in the proper court against the executor or administrator within three (3) months after the date such rejected claim is filed, if it be then due, or within two (2) months after it becomes due, otherwise the claim shall be forever barred. When the claimant has been misled by the false statements of executor, administrator, or his attorney, or personal representatives, regarding the action taken by the executor or administrator on the claim whereby the claimant has been led to believe that his claim was either approved or not yet acted upon, and because of such false information he fails to bring suit within the time herein provided, the time for bringing suit on such claim is hereby extended for a period of three months from and after the discovery by the claimant of the falsity of such statements, provided that suit must be commenced prior to the approval of the final account of the executor or administrator.

History: En. Sec. 155, p. 278, L. 1877; re-en. Sec. 155, 2nd Div. Rev. Stat. 1879; re-en. Sec. 155, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2608, C. Civ. Proc. 1895; re-en. Sec. 7530, Rev. C. 1907; re-en. Sec. 10178, R. C. M. 1921; amd. Sec. 1, Ch. 11, L. 1925; amd. Sec. 1, Ch. 192, L. 1939. Cal. C. Civ. Proc. Sec. 1498.

Amendments Relate Back to Time of Original Presentation—Further Rejection Not Proper Nor Necessary

Where amendments of claims against estates are permitted under the rule that amendments are permissible where they effect no substantial change in the claim nor introduce new or different claims as

the basis of recovery, the result does not wipe out the statutory provisions relating to presentation and action on rejected claims, since the amendments relate back to the time of the original presentation. *State ex rel. Steinfert v. District Court*, 109 M 410, 416, 97 P 2d 341.

A claim against an estate, upon being rejected, may be amended if claimant acts before the time has elapsed in which claims may be presented, or even where the time has elapsed under sec. 93-3905, authorizing amendment of pleadings or proceedings where the amendment does not change the essential grounds of recovery or increase the amount, but to supply a lack in elements necessary to express its full merits, in which event it relates back to the original presentation, and when done after the time has passed for presentation, a further rejection of the claim is neither necessary nor proper. *State ex rel. Steinfert v. District Court*, 111 M 216, 222, 107 P 2d 890.

Claim Once Presented and Rejected Is Final

Where a claim against an estate has once been presented to the administrator or executor and rejected, the claimant cannot thereafter, in evasion of this section, again present the same claim, differing from the former only in form and detail. *Lindsay v. Hogan*, 56 M 583, 585, 185 P 1118.

Id. Presentation of a claim against an estate in improper form and consequent rejection by the administrator or executor do not bar a second presentation in due form, provided the time has not elapsed in which claims may be presented.

Exclusive Remedy

This section provides an exclusive remedy, and an order disallowing a claim against an estate is not appealable under the provisions of sec. 93-8003. *In re Barker's Estate*, 26 M 279, 283, 67 P 941.

"Filing"—Mislaidd or Lost Claim

To file papers in a public office is to deposit them with the proper custodian for keeping; the marking of them "Filed" not constituting the filing. Upon rejection of a claim against an estate on September 18, it was mailed to the clerk on October 21 following, for filing, but was apparently mislaidd and not found until February 18 of the next year when it was filed, and within three months after said February 18 claimant brought suit, held, that the claim was not filed until found by the clerk and open to inspection by whomsoever it concerned, and the action brought three months thereafter was timely. *Pierce v. Pierce*, 108 M 42, 46, 89 P 2d 269.

Former Dictum on Time for Commencing Action on Amended Claim Overruled

Statement made in the case of *State ex rel. Steinfert v. District Court*, 109 M 410, 97 P 2d 341, with reference to claims presented against an estate in time, but rejected and ordered amended after time, that the amendment renders rejection by the administratrix functus officio and thus requires renewed action on the claim as amended, and upon rejection of the amended claim this section governs as to time of commencing action, overruled as dictum. Time commences at original rejection filing. *State ex rel. Steinfert v. District Court*, 111 M 216, 229, 107 P 2d 890.

Not Applicable to Actions of Tort

Held that the statutes of nonclaim which bar claims against an estate or its executor or administrator unless first presented for allowance, and, if rejected, suit brought within three months after rejection, cover only such claims as came into existence by contract, express or implied, prior to the death of the decedent, and therefore do not apply to claims for unliquidated damages arising from a tort committed by the decedent in his lifetime. *Hornbeck et al. v. Richards*, 80 M 27, 31, 257 P 1025.

Notice to Creditors of Rejection Not Necessary

Neither this section nor section 91-2707, makes it the duty either of the administrator or of the judge to give to the claimant notice of the rejection of his claim. *Lindsay v. Hogan*, 56 M 583, 586, 185 P 1118.

Purpose

One of the purposes of this section is to compel claimants promptly to seek enforcement of their claims when rejected; such a statute is a special statute of limitations. *Pierce v. Pierce*, 108 M 42, 46, 89 P 2d 269.

Suit Must be on Identical Claim

Where a claim against an estate is disallowed by the executor or administrator, the suit brought by the claimant must be upon the identical claim presented for payment. *Harwood v. Scott*, 57 M 83, 186 P 693.

When Claim Is Sufficient

If the presentation of a claim against an estate, which was rejected, advised the executor or administrator of its nature, the amount claimed, and was explicit enough to bar another action on the same demand, it was sufficient; an observance of the technical rules of pleading not being re-

quired. *Harwood v. Scott*, 57 M 83, 186 P 693.

When Suit Must be Brought

Where a claim against an estate is due at the date of its rejection, suit must be brought thereon within three months thereafter; otherwise it is barred under this section, even though no notice was given of such rejection. *Lindsay v. Hogan*, 56 M 583, 585, 185 P 1118.

References

Cited or applied as sec. 2608, Code of Civil Procedure, in *In re Davis' Estate*, 27 M 490, 496, 71 P 757; *In re Tuohy's Estate*, 33 M 230, 246, 83 P 486; *Brown v. Daly*, 33 M 523, 528, 84 P 883; as sec. 7530, Revised Codes, in *Davis v. Estate*

of *Davis*, 56 M 500, 506, 185 P 559; as sec. 7530, Revised Codes, in *Smith v. Smith*, 224 F. 1, 11, 139 C. C. A. 465; *The Ullman Co. v. Adler*, 59 M 232, 234, 196 P 157; *In re Smith's Estate*, 60 M 276, 298, 199 P 696; *State ex rel. Finley v. District Court*, 99 M 200, 43 P 2d 682.

Executors and Administrators—251, 437.

34 C.J.S. Executors and Administrators §§ 428, 448-451.

Claims for expenses of last sickness or for funeral expenses as within contemplating of statute requiring presentation of claims against decedent's estate, or limiting the time for the bringing of action thereon after rejection by personal representatives. 120 ALR 275.

91-2710. (10179) Claims barred by statute of limitations—when and whom judge may examine. No claim must be allowed by the executor or administrator, or by the judge, which is barred by the statute of limitations. When a claim is presented to a judge for his allowance, he may, in his discretion, examine the claimant and others on oath, and hear any legal evidence touching the validity of the claim.

History: En. Sec. 156, p. 279, L. 1877; re-en. Sec. 156, 2nd Div. Rev. Stat. 1879; re-en. Sec. 156, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2609, C. Civ. Proc. 1895; re-en. Sec. 7531, Rev. C. 1907; re-en. Sec. 10179, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1499.

Operation and Effect

Creditors of an estate may, upon the settlement of an administrator's final account, contest an allowed claim as barred by limitation under this section. *In re Moullerrat's Estate*, 14 M 245, 252, 36 P 185. See also *Vanderpool v. Vanderpool*, 48 M 448, 454, 138 P 772.

When claims have been presented and allowed, and are not contestable for the reason that they are barred at the time of presentation, none of the statutory limitations run as against them. *In re Tuohy's Estate*, 33 M 230, 247, 83 P 486.

While it is the general rule that the bar of the statute of limitations can be raised only by answer, where it appears to the court in an action against an execu-

tor or administrator to recover on a rejected claim that the claim, or a part of it, is barred, it must so hold though the defendant fails to interpose such defense. *Pineus v. Davis*, 95 M 375, 385, 26 P 2d 986.

References

Cited or applied as sec. 2609, Code of Civil Procedure, in *Empire State Min. Co. v. Mitchell*, 29 M 55, 58, 74 P 81; as sec. 7531, Revised Codes, in *Davis v. Estate of Davis*, 56 M 500, 506, 185 P 559.

Cited or applied as sec. 7531, Revised Codes, in *Smith v. Smith*, 224 F. 1, 11, 139 C. C. A. 465; *Hornbeck et al. v. Richards*, 80 M 27, 32, 257 P 1025; *Wunderlich v. Holt*, 86 M 260, 269, 283 P 423; *In re Livingston's Estate*, 91 M 584, 590, 9 P 2d 159; *Bahn et al. v. Estate of Fritz et al.*, 92 M 84, 92, 10 P 2d 1061.

Executors and Administrators—213, 236.

34 C.J.S. Executors and Administrators §§ 382, 428, 435.

91-2711. (10180) Claims must be presented before suit. No holder of any claim against an estate shall maintain any action thereon, unless the claim is first presented to the executor or administrator, except in the following case: An action may be brought by any holder of a mortgage or lien to enforce the same against the property of the estate subject thereto where all recourse against other property of the estate is expressly waived in the complaint.

History: En. Sec. 157, p. 279, L. 1877; re-en. Sec. 157, 2nd Div. Rev. Stat. 1879; re-en. Sec. 157, 2nd Div. Comp. Stat. 1887; amd. Sec. 2610, C. Civ. Proc. 1895; re-en.

Sec. 7532, Rev. C. 1907; amd. Sec. 1, Ch. 145, L. 1921; re-en. Sec. 10180, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1500.

Applicable Only to Claims Existing at Time of Death

Services performed for the benefit of an estate, at the request of the executor thereof, and subsequent to the death of the testator, are included within the expenses of administration, and are not "claims" against the estate. *Dodson v. Nevitt*, 5 M 518, 521, 6 P 358.

Held, that sec. 91-2704, providing that claims against a decedent's estate arising upon contracts, whether due, not due or contingent, are barred unless presented to the executor within the time limited in the notice to creditors, and this section, declaring that a creditor cannot maintain suit on his claim (excepting a mortgage debt or claim for funeral expenses) unless so presented, have reference only to indebtedness of the deceased contracted by him in his lifetime and existent at the time of death, and therefore have no application to obligations arising subsequent to his death by reason of a breach of an executory contract, such latter obligation becoming by operation of law that of his personal representative. *Nathan v. Freeman et al.*, 70 M 259, 266, 225 P 1015.

Estates Cease to Exist After Decree of Distribution

The estate of a deceased person dealt with by sec. 91-2704, and this section, the intent of which is to permit a mortgagee to foreclose his mortgage although the mortgagor has died, provided the mortgagee shall not have recourse against any other property of the decedent's estate unless he first presents his mortgage claim to the executor or administrator in accordance with the statute, ceases to exist upon entry of decree of distribution which is conclusive and has the force of *res adjudicata*; after the estate is declared closed the court has neither jurisdiction over the property of the estate nor the executor or administrator. *State v. District Court et al.*, 76 M 143, 147 et seq., 245 P 529.

Not Applicable to Closed Estates

Held, on application for writ of supervisory control, that where after the estate of a deceased person had been distributed, the holder of a real estate mortgage executed by decedent during his lifetime commenced suit to foreclose without asking for a deficiency judgment, the sole heir not answering, the district court erred in dismissing the suit for want of jurisdiction because of plaintiff's failure to al-

lege that he had presented his claim to the administrator or, in the absence of presentation of such claim, that he waived all recourse against the decedent's property other than that covered by the mortgage, since the provisions of sec. 91-2704 and this section are applicable only to an estate still in course of administration and not to one that has been closed. *State v. District Court et al.*, 76 M 143, 147 et seq., 245 P 529.

Operation and Effect

No action on a claim against the estate of a deceased person for work and labor can be maintained, unless the same has been presented to the executor or administrator for allowance. *Dodson v. Nevitt*, 5 M 518, 521, 6 P 358.

No action can be maintained upon a claim against a decedent's estate unless it has been first presented to the executor or administrator for allowance; neither can it be maintained unless the identical claim sued upon is the one that was presented. A party cannot present a claim founded upon an open account and then maintain an action upon a promissory note, or vice versa; and, if he attempts to do so, the result is such a variance as amounts to a failure of proof. *Vanderpool v. Vanderpool*, 48 M 448, 453, 138 P 772.

Id. A complaint in an action to recover on a claim against an estate fails to state a cause of action unless it expressly alleges that the claim as made was first presented to the executor or administrator.

This section, authorizing an action against an estate to enforce a lien against its property without first presenting a claim to the executor or administrator, on condition that claimant waives recourse against all other property of the estate, rests upon the principle that the property to the extent of the lien is segregated from the general assets of the estate, and carries the inference that the successful lienholder may enforce the judgment by execution upon the property to which the lien attaches. In *re Stevenson*, 87 M 486, 496, 289 P 566.

References

Cited or applied as sec. 2610, Code of Civil Procedure, in *Jones v. Rich*, 20 M 289, 291, 50 P 936; *Brown v. Daly*, 33 M 523, 528, 84 P 883; *Harrington v. Butte & Boston Min. Co.*, 35 M 530, 531, 90 P 748; *Harwood v. Scott*, 57 M 83, 89, 186 P 693; *Emerson-Brantingham I. Co. v. Anderson*, 58 M 617, 628, 194 P 160.

Cited or applied as sec. 7532, Revised Codes, in *Smith v. Smith*, 224 F. 1, 4, 139 C. C. A. 465; *The Ullman Co. v. Adler*, 59 M 232, 234, 196 P 157; *Hornbeck et al. v. Richards*, 80 M 27, 32, 257 P 1025;

Wunderlich v. Holt, 86 M 260, 269, 283 P 423; State v. District Court et al., 90 M 281, 289, 1 P 2d 335; Mitchell v. Banking Corp. of Montana, 94 M 165, 169, 22 P 2d 175; Leffek v. Luedeman, 95 M 457, 469, 27 P 2d 511; Swanson v. Gnose, 106 M 262, 267, 76 P 2d 643; State v. Pahnish, 116 M 340, 343, 151 P 2d 1001.

Executors and Administrators—431 (2, 3).

34 C.J.S. Executors and Administrators §§ 701, 702.

Necessity of presenting claim to executor or administrator before bringing suit. 34 ALR 362.

91-2712. (10181) Effective date. This act shall be in full force and effect from and after its passage and approval; provided, however, nothing herein contained shall be construed as affecting any cause of action or litigation now pending in any court in the state of Montana.

History: En. Sec. 3, Ch. 145, L. 1921; re-en. Sec. 10181, R. C. M. 1921.

Executors and Administrators—422.

34 C.J.S. Executors and Administrators § 691.

91-2713. (10182) Time of limitation. The time during which there shall be a vacancy in the administration must not be included in any limitations herein prescribed.

History: En. Sec. 158, p. 279, L. 1877; re-en. Sec. 158, 2nd Div. Rev. Stat. 1879; re-en. Sec. 158, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2611, C. Civ. Proc. 1895; re-en. Sec. 7533, Rev. C. 1907; re-en. Sec. 10182, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1501.

Executors and Administrators—437 (4).

34 C.J.S. Executors and Administrators §§ 732, 733.

91-2714. (10183) Claims in action pending at time of decease. If an action is pending against the decedent at the time of his death, the plaintiff must in like manner present his claim to the executor or administrator for allowance or rejection, authenticated as required in other cases; and no recovery shall be had in the action, unless proof be made of the presentations required.

History: En. Sec. 159, p. 280, L. 1877; re-en. Sec. 159, 2nd Div. Rev. Stat. 1879; re-en. Sec. 159, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2612, C. Civ. Proc. 1895; re-en. Sec. 7534, Rev. C. 1907; re-en. Sec. 10183, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1502.

forfeited as if defendant's death had not occurred; or where the claim has been approved by administrator and judge, he may rest upon that approval as upon a judgment, the duty then devolving upon the administrator to apply the property covered by the lien to the satisfaction of the claim. In re Stevenson, 87 M 486, 494, 289 P 566.

Operation and Effect

Where defendant's answer admitted that a verified claim for the amount sued for had been duly presented and disallowed by the administrator of one of the defendants, plaintiff was not required to prove the presentation and disallowance of such claim. Harrington v. Butte & Boston Min. Co., 35 M 530, 532, 90 P 748.

Under the rule that where a suitable procedure is not provided by the codes whereby the district court may carry its general jurisdiction into effect, it may adopt any suitable process or mode of proceeding most conformable to the spirit of the codes, held, that where pending action to foreclose a lien the defendant dies before judgment, the plaintiff may present his claim in accordance with this section, and prosecute the action to judgment, whereupon the same relief may be af-

This section, which requires presentation of a claim against an estate to the executor or administrator if an action is pending against decedent, applies only to such claims as would require presentation if no action had been commenced against decedent during his lifetime. Mitchell v. Banking Corp. of Montana, 94 M 165, 169 et seq., 22 P 2d 175.

References

Cited or applied as sec. 2612, Code of Civil Procedure, in Dorais v. Doll, 33 M 314, 316, 83 P 884; Leffek v. Luedeman, 95 M 457, 468, 27 P 2d 511.

Executors and Administrators—224.

34 C.J.S. Executors and Administrators §§ 399-403.

91-2715. (10184) Allowance of claim in part. Whenever any claim is presented to an executor or administrator, or to a judge, and he is willing to allow the same in part, he must state in his indorsement the amount he is willing to allow. If the creditor refuse to accept the amount allowed in satisfaction of his claim, he shall recover no costs in any action therefor brought against the executor or administrator, unless he recover a greater amount than that offered to be allowed.

History: En. Sec. 160, p. 280, L. 1877; re-en. Sec. 160, 2nd Div. Rev. Stat. 1879; re-en. Sec. 160, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2613, C. Civ. Proc. 1895; re-en. Sec. 7535, Rev. C. 1907; re-en. Sec. 10184, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1503.

References

Swanson v. Gnose, 106 M 262, 267, 76 P 2d 643.

Executors and Administrators 237, 456.

34 C.J.S. Executors and Administrators §§ 428, 819 et seq.

Power and responsibility of executor or administrator in respect of waiver or compromise of claim to estate. 85 ALR 176.

Right of executor or administrator to settle or compromise action or cause of action for death; and power of probate court to authorize such settlement. 103 ALR 445.

Return or tender of consideration for relief or compromise of interest in decedent's estate as condition of action for rescission or cancelation, action upon original claim, or action for damages sustained by the fraud inducing the release or compromise. 134 ALR 164.

91-2716. (10185) Effect of judgment against executor or administrator. A judgment rendered against an executor or administrator, upon any claim for money against the estate of his testator or intestate, only establishes the claim in the same manner as if it had been allowed by the executor or administrator and a judge; and the judgment must be that the executor or administrator pay, in due course of administration, the amount ascertained to be due. A certified transcript of the docket of the judgment must be filed among the papers of the estate in court. No execution must issue upon such judgment, nor shall it create any lien upon the property of the estate, or give to the judgment creditor any priority of payment.

History: En. Sec. 161, p. 280, L. 1877; re-en. Sec. 161, 2nd Div. Rev. Stat. 1879; re-en. Sec. 161, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2614, C. Civ. Proc. 1895; re-en. Sec. 7536, Rev. C. 1907; re-en. Sec. 10185, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1504.

Claims Not Liens Against Property of Estate

Claims against the estate of a deceased person, duly approved, are not liens on the property of the estate, and no execution for their enforcement can issue. They are merely acknowledged debts payable in the course of administration. *Montgomery v. First National Bank of Dillon*, 114 M 395, 405, 136 P 2d 760.

Operation and Effect

A judgment in an action against an administratrix to recover for services rendered to deceased, to the effect that plaintiff "have and recover" from the defendant, as administratrix, the amount of the verdict and costs, though defective under this section, does not require a reversal of the judgment. *Gauss v. Trump*, 48 M 92, 102, 135 P 910.

A judgment against an executor or administrator upon a claim against the estate establishes the claim to be paid in due course of administration. In *re Smith's Estate*, 60 M 276, 296, 199 P 696.

Id. A judgment against the executor or administrator of an estate is in effect a judgment against the estate, and all persons interested in the estate, whether they be heirs, legatees or creditors, as privies are foreclosed by it on the merits of the claim.

Where a creditor of an estate presents his claim to the administrator who approves it and it is thereupon approved by the district court, the claim, filed in court, is an acknowledged debt of the estate having the same force as a judgment rendered against the administrator (sec. 91-2708 and this section), and the lien secured by attachment in an action against decedent which at the time of her death had not proceeded to judgment is thereby perfected to the amount approved. In *re Stevenson*, 87 M 486, 495, 289 P 566.

Judgment in an action against the executors of the estate of a decedent bank

stockholder to recover on his statutory liability, held not objectionable as not providing that the amount awarded plaintiff should be paid in due course of administration of the estate. (Mr. Chief Justice Callaway dissenting.) *Mitchell v. Banking Corp. of Montana*, 94 M 165, 182, 22 P 2d 175.

Under this section no execution may be issued upon a judgment against an executor or administrator secured upon for a claim for money; the assets of an estate being thus secured as against the entire world, in the hands of an executor or ad-

ministrator, at least as to an estate's liability on a money judgment. *State ex rel. Biering v. District Court*, 115 M 174, 181, 140 P 2d 583.

References

Lamont v. Vinger, 61 M 530, 543, 202 P 769; *State v. Yellowstone Bank etc. Co.*, 75 M 43, 50, 243 P 813; *Leffek v. Luedeman*, 95 M 457, 468, 27 P 2d 511.

Executors and Administrators \S 241, 255, 454.

34 C.J.S. Executors and Administrators \S 753, 754, 755, 807-811.

91-2717. (10186) Execution not to issue after death—if one is levied the property may be sold. When any judgment has been rendered for or against the testator or intestate, in his lifetime, no execution shall issue thereon after his death, except as provided in section 93-5808. A judgment against the decedent for the recovery of money must be presented to the executor or administrator like any other claim. If execution is actually levied upon any property of the decedent before his death, the same may be sold for the satisfaction thereof; and the officer making the sale must account to the executor or administrator for any surplus in his hands. A judgment creditor having a judgment which was rendered against the testator or intestate in his lifetime, may redeem any real estate of the decedent from any sale under foreclosure or execution, in like manner and with like effect as if the judgment debtor were still living.

History: En. Sec. 162, p. 281, L. 1877; re-en. Sec. 162, 2nd Div. Rev. Stat. 1879; re-en. Sec. 162, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2615, C. Civ. Proc. 1895; re-en. Sec. 7537, Rev. C. 1907; re-en. Sec. 10186, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1505.

Operation and Effect

Under this section execution may not issue after the death of a party on a judgment rendered against him in his lifetime, except, as provided by sec. 93-5808, where the judgment is inter alia for the enforcement of a lien on the property of the decedent. In *re Stevenson*, 87 M 486, 496, 289 P 566.

Quaere: Does sec. 93-4321, by providing that the death of a defendant whose property has been attached does not release the attached property and that the attachment may be enforced as in the case of other liens, authorize the enforcement of the attachment lien by execution? *Davis et al. v. Claxton et al.*, 82 M 574, 584, 268 P 787.

Held, on an analysis of this section and sections 93-5808 and 93-4321 that the levy of an attachment on real property made at the commencement of an action on a promissory note creates a lien which may be enforced by execution where the levy was made and judgment obtained prior to the judgment debtor's death. *Andrews v. Smithson*, 114 M 360, 367, 136 P 2d 531.

References

Cited or applied as sec. 7537, Revised Codes, in *Hamilton v. Hamilton*, 51 M 509, 523, 154 P 717; *Leffek v. Luedeman*, 95 M 457, 468, 27 P 2d 511.

Execution \S 69, 216, 291, 293 et seq.; Executors and Administrators \S 40, 224 et seq.; Mortgages \S 591 (1), 594 (2) and other particular topics.

33 C.J.S. Executions \S 65, 197, 199, 253, 254; 33 C.J.S. Executors and Administrators \S 104; 34 C.J.S. Executors and Administrators \S 399-403; 42 C.J. Mortgages \S 2067 et seq.

91-2718. (10187) What judgment is not a lien on real property of an estate. A judgment rendered against a decedent, dying after a verdict or decision on an issue of fact, but before judgment is rendered thereon, is not a lien on the real property of the decedent, but is payable in due course of administration.

History: En. Sec. 163, p. 281, L. 1877; re-en. Sec. 163, 2nd Div. Rev. Stat. 1879; re-en. Sec. 163, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2616, C. Civ. Proc. 1895; re-en. Sec. 7538, Rev. C. 1907; re-en. Sec. 10187, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1506.

References

Leffek v. Luedeman, 95 M 457, 469, 27 P 2d 511.

Executors and Administrators 202 (1) et seq.; Judgment 762.

34 C.J.S. Executors and Administrators §§ 367, 378, 389, 391, 392; 49 C.J.S. Judgments § 458.

91-2719. (10188) May refer doubtful claims—effect of referee's allowance or rejection. If the executor or administrator doubts the correctness of any claim presented to him, he may enter into an agreement, in writing, with the claimant, to refer the matter in controversy to some disinterested person, to be approved by the court or judge. Upon filing the agreement and approval of the court or judge, in the office of the clerk of the court for the county in which the letters testamentary or of administration were granted, the clerk must enter a minute of the order referring the matter in controversy to the person so selected; or, if the parties consent, a reference may be had in the court; and the report of the referee, if confirmed, establishes or rejects the claim the same as if it had been allowed or rejected by the executor or administrator and judge.

History: En. Sec. 164, p. 281, L. 1877; re-en. Sec. 164, 2nd Div. Rev. Stat. 1879; re-en. Sec. 164, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2617, C. Civ. Proc. 1895; re-en. Sec. 7539, Rev. C. 1907; re-en. Sec. 10188, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1507.

References

Swanson v. Gnose, 106 M 262, 267, 76 P 2d 643.

Executors and Administrators 246.

34 C.J.S. Executors and Administrators §§ 442-443.

Power and responsibility of executor or administrator in respect of waiver or compromise of claim to estate. 85 ALR 176.

Right of executor or administrator to settle or compromise action or cause of action for death; and power of probate court to authorize such settlement. 103 ALR 445.

Return or tender of consideration for relief or compromise of interest in decedent's estate as condition of action for rescission or cancellation, action upon original claim, or action for damages sustained by the fraud inducing the release or compromise. 134 ALR 164.

91-2720. (10189) Trial by referee—how confirmed and its effect. The referee must hear and determine the matter, and make his report thereon to the court in which his appointment is entered. The same proceedings shall be had in all respects, and the referee shall have the same powers, be entitled to the same compensation, and subject to the same control, as in other cases of reference. The court or judge may remove the referee, appoint another in his place, set aside or confirm his report, and adjudge costs, as in actions against executors or administrators, and the order or judgment thereon shall be as valid and effectual, in all respects, as if the same had been rendered in an action commenced by ordinary process.

History: En. Sec. 165, p. 282, L. 1877; re-en. Sec. 165, 2nd Div. Rev. Stat. 1879; re-en. Sec. 165, 2nd Div. Comp. Stat. 1887;

re-en. Sec. 2618, C. Civ. Proc. 1895; re-en. Sec. 7540, Rev. C. 1907; re-en. Sec. 10189, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1508.

91-2721. (10190) Liability of executor or administrator for costs. When a judgment is recovered, with costs, against any executor or administrator, he shall be individually liable for such costs, but they must be allowed him in his administration accounts, unless it appears that the suit or proceeding

in which the costs were taxed was prosecuted or defended without just cause.

History: En. Sec. 166, p. 282, L. 1877; re-en. Sec. 166, 2nd Div. Rev. Stat. 1879; re-en. Sec. 166, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2619, C. Civ. Proc. 1895; re-en. Sec. 7541, Rev. C. 1907; re-en. Sec. 10190, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1509.

Operation and Effect

Where the supreme court in the disposition of an appeal from an order settling an administrator's account remands the cause with directions to require that officer to file a further account and orders, as it may do under sec. 91-4318, that the costs incident to the appeal shall be

paid by the administrator personally, the jurisdiction of the district court is limited to the enforcement of the order, except that it may determine disputed questions of costs, or on final settlement of the account allow such portions of the costs incurred as a charge against the estate as justice may require. (Provisions of this section not applicable.) In *re Jennings' Estate*, 79 M 73, 78, 254 P 1067.

Executors and Administrators—456 (3-5).

34 C.J.S. Executors and Administrators § 455.

91-2722. (10191) Claims of executor or administrator against the estate.

If the executor or administrator is a creditor of the decedent, his claim, duly authenticated by affidavit, must be presented for allowance or rejection to the judge, and its allowance by the judge is sufficient evidence of its correctness, and must be paid as other claims in due course of administration. If, however, the judge reject the claim, action thereon may be had against the estate by the claimant, and summons must be served upon the judge, who may appoint an attorney, at the expense of the estate, to defend the action. If the claimant recover no judgment, he must pay all costs, including defendant's reasonable attorney's fees, to be fixed by the court or judge.

History: En. Sec. 167, p. 282, L. 1877; re-en. Sec. 167, 2nd Div. Rev. Stat. 1879; re-en. Sec. 167, 2nd Div. Comp. Stat. 1887; amd. Sec. 2620, C. Civ. Proc. 1895; re-en. Sec. 7542, Rev. C. 1907; re-en. Sec. 10191, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1510.

Operation and Effect

Where a claim is presented against an estate by an executrix in her personal capacity and disallowed, she cannot bring an action for the amount of the claim against herself acting as executrix of the estate. *Phillips v. Phillips*, 18 M 305, 45 P 221.

An executor or administrator may, in good faith, make advances to the estate, if suitable and for its benefit. Such advances may be allowed and recovered as claims against the estate. In *re Williams' Estate*, 47 M 325, 331, 132 P 421.

Held, that where an executor neither in the inventory and appraisement nor in his

accounts prior to final settlement of the estate had mentioned an alleged indebtedness of decedent to him for taking care of his cattle and paying taxes thereon, and his claim for reimbursement was not made until long after the time for presenting claims had expired and not until his final account was ordered reopened at the instance of the heirs, it was error to allow such items as an offset against the amount for which he was accountable. In *re Rodgers' Estate*, 68 M 46, 54, 217 P 678.

References

Cited or applied as sec. 7542, Revised Codes, in *Davis v. Estate of Davis*, 56 M 500, 506, 185 P 559.

Executors and Administrators—228 (2) et seq., 427, 430, 456 (5).

34 C.J.S. Executors and Administrators §§ 410, 455.

91-2723. (10192) Executor or administrator neglecting to give notice to creditors to be removed. If an executor or administrator neglects, for two months after his appointment, to give notice to creditors, as prescribed by this chapter, the court or judge must revoke his letters, and appoint some other person in his stead, equally or the next in order entitled to the appointment.

History: En. Sec. 168, p. 283, L. 1877; re-en. Sec. 168, 2nd Div. Rev. Stat. 1879; re-en. Sec. 168, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2621, C. Civ. Proc. 1895; re-en. Sec. 7543, Rev. C. 1907; re-en. Sec. 10192, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1511.

Executors and Administrators \Rightarrow 35 (1).
33 C.J.S. Executors and Administrators
§ 90.

91-2724. (10193) Executor or administrator to return statement of claims. At the same time at which he is required to return his inventory, the executor or administrator must also return a statement of all claims against the estate which have been presented to him, if so required by the court or judge, and from time to time thereafter he must present a statement of claims subsequently presented to him, if so required by the court or judge. In all such statements he must designate the names of the creditors, the nature of each claim, when it became due, or will become due, and whether it was allowed or rejected by him.

History: En. Sec. 169, p. 283, L. 1877; re-en. Sec. 169, 2nd Div. Rev. Stat. 1879; re-en. Sec. 169, 2nd Div. Comp. Stat. 1887; amd. Sec. 2622, C. Civ. Proc. 1895; re-en. Sec. 7544, Rev. C. 1907; re-en. Sec. 10193, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1512.

References
In re Rinio's Estate, 93 M 428, 433, 19 P 2d 322.

Executors and Administrators \Rightarrow 458 et seq.
34 C.J.S. Executors and Administrators
§§ 828, 837 et seq.

91-2725. (10194) Payment of debt to stop running of interest. If there be any debt of the decedent bearing interest, whether presented or not, the executor or administrator may, by order of the court or judge, pay the amount then accumulated and unpaid, or any part thereof, at any time when there are sufficient funds properly applicable thereto, whether said claim be then due or not; and interest shall thereupon cease to accrue upon the amount so paid.

History: En. Sec. 170, p. 283, L. 1877; re-en. Sec. 170, 2nd Div. Rev. Stat. 1879; re-en. Sec. 170, 2nd Div. Comp. Stat. 1887; amd. Sec. 2623, C. Civ. Proc. 1895; re-en. Sec. 7545, Rev. C. 1907; re-en. Sec. 10194, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1513.

a special administrator. State ex rel. Bartlett v. District Court, 18 M 481, 486, 46 P 259.

References
In re Jennings' Estate, 74 M 449, 465, 241 P 648; In re McKinnon's Estate, ___ M ___, 164 P 2d 726, 727.

Executors and Administrators \Rightarrow 267, 277.
34 C.J.S. Executors and Administrators
§§ 464, 466.

Operation and Effect

This section relates to the payment of claims during the regular course of administration, and does not authorize an order directing the payment of a claim by

CHAPTER 28

SALES OF PROPERTY OF ESTATE IN GENERAL—BORROWING MONEY —SALES OF CERTAIN PERSONAL PROPERTY

- Section** 91-2801. Estate chargeable with debts—no priority.
91-2802. Money may be borrowed.
91-2803. No sales valid except by order of district court.
91-2804. Petitions for orders of sale.
91-2805. But one petition, order and sale must be had when it is possible to do so.
91-2806. Perishable and depreciating property to be sold.
91-2807. Order to sell personal property.
91-2808. Partnership interests and choses in action—how sold.
91-2809. Order of sale—what to direct and what to be sold first.
91-2810. Sale of personal property.

91-2801. (10195) Estate chargeable with debts—no priority. All the property of the decedent shall be chargeable with the payment of the debts of the deceased, the expenses of the administration, and the allowance to the family, except as otherwise provided in this code. And the said property, personal and real, may be sold as the court or judge may direct, in the manner prescribed in this chapter. There shall be no priority as between personal and real property for the above purposes.

History: En. Sec. 171, p. 283, L. 1877; re-en. Sec. 171, 2nd Div. Rev. Stat. 1879; re-en. Sec. 171, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2640, C. Civ. Proc. 1895; re-en. Sec. 7546, Rev. C. 1907; re-en. Sec. 10195, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1516.

Operation and Effect

This section, when read in connection with section 91-302, indicates that all of the property of the estate is subject to the payment of the debts, using that term in its general sense, to include debts, family allowances, expenses, and charges of administration already accrued and to accrue. *Plains Land & Improvement Co. v. Lynch*, 38 M 271, 283, 99 P 847.

References

Cited or applied as sec. 2640, Code of Civil Procedure, in *Tuohy's Estate*, 23 M

305, 309, 58 P 722; as sec. 7546, Revised Codes, in *In re Blackburn's Estate*, 51 M 234, 237, 152 P 31; *Mathews v. Marsden et al.*, 71 M 502, 511, 230 P 775; *In re McGovern's Estate*, 77 M 182, 197, 250 P 812; *Swanberg v. National Surety Co.*, 86 M 340, 354 et seq., 283 P 761; *Leffek v. Luedeman*, 95 M 457, 468, 27 P 2d 511; *Gaines v. Van Demark*, 106 M 1, 10, 74 P 2d 454; *Montgomery v. First National Bank of Dillon*, 114 M 395, 412, 136 P 2d 760.

Executors and Administrators—270-274, 323 et seq.

34 C.J.S. Executors and Administrators §§ 478 et seq., 540 et seq.

21 Am. Jur. 695, Executors and Administrators, §§ 561 et seq.

91-2802. (10196) Money may be borrowed. In all cases the executor or administrator of an estate, instead of selling the property of the estate to pay the charges and demands against the same, may borrow money at the lowest rate of interest at which it may be had, and for such length of time as the court or judge may allow, to pay such claims, when it shall be made to appear to the court or judge, by petition and evidence, that an immediate sale of the property of the estate will be detrimental to the heirs, devisees, legatees, or other persons having an interest therein; and in such case the estate shall be chargeable with the payment of the sum so borrowed and interest thereon. Such petition may be by the executor or administrator, or by any one of the heirs of the deceased, or other person interested in the estate. Notice shall be given as follows: If by the executor or administrator, to all the heirs, devisees, legatees residing in the state; and if by an heir, devisee, or legatee, to the administrator or executor, and to all other heirs, devisees, and legatees residing in the state. The notice must be given by personal service on all persons residing in the state. If any persons interested in the estate, as above mentioned, are not residents of or cannot be found within the state, then notice must be given by publication in some newspaper published in the county, at least once a week for four successive weeks.

History: En. Sec. 172, p. 284, L. 1877; re-en. Sec. 172, 2nd Div. Rev. Stat. 1879; re-en. Sec. 172, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2641, C. Civ. Proc. 1895; re-en. Sec. 7547, Rev. C. 1907; re-en. Sec. 10196, R. C. M. 1921.

Operation and Effect

Where at the time of the appointment of an administrator there were crops growing upon the lands of the estate, which but for timely care and harvesting might have been lost, he may be allowed the

reasonable expense incurred in that behalf, even though he obtained the necessary funds by borrowing upon the credit of the estate without first obtaining an order of court permitting him to do so. In re Jennings' Estate, 74 M 449, 241 P 648.

When necessary to pay the debts of an estate it is the duty of the administrator to take the requisite steps for that purpose under either of the three methods provided by secs. 91-2801, this section, 91-3001 and 91-3101. Swanberg v. National Surety Co., 86 M 340, 356, 283 P 761.

The rule that an executor is entitled to legal interest on necessary advances made in good faith when beneficial to the estate, applies where he borrows money for the

purpose of paying taxes on estate property without previous court order. In re Kelley's Estate, 91 M 98, 103, 5 P 2d 559.

References

Lamont v. Vinger, 61 M 530, 542, 202 P 769.

Executors and Administrators—98.

33 C.J.S. Executors and Administrators § 202.

21 Am. Jur. 508, Executors and Administrators, § 240.

Character of claims or obligations contemplated by statute expressly empowering executors, administrators, or guardians to borrow money. 85 ALR 215.

91-2803. (10197) No sales valid except by order of district court. No sale of any property of an estate of a decedent is valid unless made under order of the district court, or a judge thereof, except as otherwise provided in this chapter. All sales must be made under oath reported to and confirmed by the court or judge before the title to the property sold passes.

History: En. Sec. 173, p. 284, L. 1877; re-en. Sec. 173, 2nd Div. Rev. Stat. 1879; re-en. Sec. 173, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2642, C. Civ. Proc. 1895; re-en. Sec. 7548, Rev. C. 1907; re-en. Sec. 10197, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1517.

Operation and Effect

The district court, sitting in probate, has a discretion to refuse to confirm a sale of personal property upon the sole ground that a bid of ten per cent in excess of the former bid, together with the costs of resale, has been received; and, where no abuse of such discretion is shown, an application for a writ of supervisory

control to compel the confirmation of the sale will be dismissed. State ex rel. King v. District Court, 42 M 182, 187, 111 P 717.

References

In re Jennings' Estate, 74 M 449, 457, 241 P 648.

Executors and Administrators—137, 158, 319 et seq.

33 C.J.S. Executors and Administrators §§ 269, 270, 272, 296, 305, 308, 311, 322; 34 C.J.S. Executors and Administrators §§ 536, 555, 556.

91-2804. (10198) Petitions for orders of sale. All petitions for orders of sale must be in writing, setting forth the facts showing the sale to be necessary, and, upon the hearing, any person interested in the estate may file his written objections, which must be heard and determined. A failure to set forth the facts showing the sale to be necessary will not invalidate the subsequent proceedings, if the defect be supplied by the proofs at the hearing, and the general facts showing the necessity be stated in the order directing the sale.

History: En. Sec. 174, p. 285, L. 1877; re-en. Sec. 174, 2nd Div. Rev. Stat. 1879; re-en. Sec. 174, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2643, C. Civ. Proc. 1895; re-en. Sec. 7549, Rev. C. 1907; re-en. Sec. 10198, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1518.

Executors and Administrators—336.

34 C.J.S. Executors and Administrators §§ 555, 558, 562.

21 Am. Jur. 711, Executors and Administrators, §§ 585 et seq.

91-2805. (10199) But one petition, order and sale must be had when it is possible to do so. When it appears to the court or judge that the estate is insolvent, or that it will require a sale of all the property of the estate of every character, to pay the family allowance, expenses of administration, and debts, there need be but one petition filed, but one order of sale made,

and but one sale had, except in the case of perishable property, which may be sold as provided in section 91-2806. The court or judge, when a petition for the sale of any property for any of the purposes herein named is presented, must inquire fully into the probable amount required to make all such payments, and, if there be no more estate than sufficient to pay the same, may require but one proceeding for the sale of the entire estate. In such case the petition must set forth substantially the facts required by section 91-3002.

History: En. Sec. 175, p. 285, L. 1877; re-en. Sec. 175, 2nd Div. Rev. Stat. 1879; re-en. Sec. 175, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2644, C. Civ. Proc. 1895; re-en. Sec. 7550, Rev. C. 1907; re-en. Sec. 10199, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1519.

Executors and Administrators—330, 332, 336 et seq.

34 C.J.S. Executors and Administrators §§ 553, 555, 556, 558, 562.

91-2806. (10200) Perishable and depreciating property to be sold. At any time after receiving letters, the executor or administrator, or special administrator, may apply to the court or judge and obtain an order to sell perishable and other personal property liable to depreciate in value, or which will incur loss or expense by being kept, and so much other personal property as may be necessary to pay the allowance made to the family of the decedent. The order for the sale may be made without notice; but the executor, administrator, or special administrator is responsible for the property, unless, after making a sworn return or on a proper showing, the court or judge shall approve the same.

History: En. Sec. 176, p. 285, L. 1877; re-en. Sec. 176, 2nd Div. Rev. Stat. 1879; re-en. Sec. 176, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2650, C. Civ. Proc. 1895; re-en. Sec. 7551, Rev. C. 1907; re-en. Sec. 10200, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1522.

References

Cited or applied as sec. 7551, Revised Codes, in State ex rel. King v. District Court, 42 M 182, 185, 111 P 717; In re Rinio's Estate, 93 M 428, 431, 19 P 2d 322.

91-2807. (10201) Order to sell personal property. If claims against the estate have been allowed, and a sale of property is necessary for their payment, or for the expenses of administration, or for the payment of legacies, the executor or administrator may apply for an order to sell so much of the personal property as may be necessary therefor. Upon filing his petition, notice of at least five days must be given of the hearing of the application, either by posting notices or by advertising. He may also make a similar application from time to time, so long as any personal property remains in his hands, and sale thereof is necessary. If it appears for the best interests of the estate, he may, at any time after filing the inventory, in like manner, and after giving like notice, apply for and obtain an order to sell the whole of the personal property belonging to the estate, whether necessary to pay debts or not.

History: En. Sec. 177, p. 285, L. 1877; re-en. Sec. 177, 2nd Div. Rev. Stat. 1879; re-en. Sec. 177, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2651, C. Civ. Proc. 1895; re-en. Sec. 7552, Rev. C. 1907; re-en. Sec. 10201, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1523.

Executors and Administrators—329 (1), 332 et seq.

34 C.J.S. Executors and Administrators §§ 549-551, 556 et seq.

21 Am. Jur. 695-697, Executors and Administrators, §§ 561-564.

91-2808. (10202) Partnership interests and choses in action—how sold. Partnership interests or interests belonging to any estate by virtue of any

partnership formerly existing, interests in personal property pledged, and choses in action may be sold in the same manner as other personal property, when it appears to be for the best interests of the estate. Before confirming the sale of any partnership interest, whether made to the surviving partner or any other person, the court or judge must carefully inquire into the condition of the partnership affairs, and must examine the surviving partner, if in the county and able to be present in court.

History: En. Sec. 178, p. 286, L. 1877; re-en. Sec. 178, 2nd Div. Rev. Stat. 1879; re-en. Sec. 178, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2652, C. Civ. Proc. 1895; re-en. Sec. 7553, Rev. C. 1907; re-en. Sec. 10202, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1524. Executors and Administrators 329 (1), 339 et seq. 34 C.J.S. Executors and Administrators §§ 549-551, 568, 569, 573.

91-2809. (10203) Order of sale—what to direct and what to be sold first. If it appears that a sale is necessary for the payment of debts or the family allowance, or for the best interests of the estate and the persons interested in the property to be sold, whether it is or is not necessary to pay the debts or family allowance, the court or judge must order it to be made. In making orders and sales for the payment of debts or family allowance, such articles as are not necessary for the support and subsistence of the family of the decedent, or are not specially bequeathed, must be first sold, and the court or judge must so direct.

History: En. Sec. 179, p. 286, L. 1877; re-en. Sec. 179, 2nd Div. Rev. Stat. 1879; re-en. Sec. 179, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2653, C. Civ. Proc. 1895; re-en. Sec. 7554, Rev. C. 1907; re-en. Sec. 10203, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1525.

91-2810. (10204) Sale of personal property. The sale of personal property must be made at public auction, after public notice given for at least ten days by notices posted in three public places in the county, or by publication in a newspaper, or both, containing the time and place of sale, and a brief description of the property to be sold, unless for good reason shown the court, or a judge thereof, orders a private sale, or a shorter notice. Public sales of such property must be had at the courthouse door, or at the residence of the decedent, or at some other public place; but no sale shall be made of any personal property which is not present at the time of sale, and the sale must be for cash, unless the court or judge otherwise order. The sale of stocks and bonds, grains, or any other personal property, with the exception of livestock, having an established market, may be had at private sale, with or without notice in the discretion of the court or judge, and the executor or administrator shall be held accountable for the market value of such personal property at the time such sale was held.

History: En. Sec. 180, p. 286, L. 1877; re-en. Sec. 180, 2nd Div. Rev. Stat. 1879; re-en. Sec. 180, 2nd Div. Comp. Stat. 1887; amd. Sec. 2654, C. Civ. Proc. 1895; re-en. Sec. 7555, Rev. C. 1907; re-en. Sec. 10204, R. C. M. 1921; amd. Sec. 1, Ch. 77, L. 1937. Cal. C. Civ. Proc. Sec. 1526. Executors and Administrators 360 et seq. 34 C.J.S. Executors and Administrators §§ 587, 593. 21 Am. Jur. 695-697, Executors and Administrators, §§ 561-564.

CHAPTER 29

SUMMARY SALE OF MINES AND MINING INTERESTS

- Section 91-2901. How personalty interest in mines sold.
 91-2902. How realty interest in mines sold.

91-2901. (10205) How personalty interest in mines sold. Capital stock in mining corporations and other mining interests constituting personal property may be sold as other personal property under the provisions of this code applicable to such sales.

History: En. Sec. 181, p. 287, L. 1877;
 re-en. Sec. 181, 2nd Div. Rev. Stat. 1879;
 re-en. Sec. 181, 2nd Div. Comp. Stat. 1887;
 re-en. Sec. 2660, C. Civ. Proc. 1895; re-en.
 Sec. 7556, Rev. C. 1907; re-en. Sec. 10205,
 R. C. M. 1921; amd. Sec. 1, Ch. 84, L. 1941.
 Cal. C. Civ. Proc. Sec. 1529.

References

In re Walker's Estate, 111 M 66, 72, 106
 P 2d 341.

Executors and Administrators—328 et
 seq.

34 C.J.S. Executors and Administrators
 §§ 546, 555 et seq.

91-2902. (10206) How realty interest in mines sold. Mines and mining interests constituting real estate may be sold under the provisions of sections 91-3001 to 91-3039 in the same manner as other real estate or real estate interests or by option. Any such option shall specify the price, the time of payment of the price, and the amount and time of payment of installments of the price, and shall contain such other provisions as may be reasonably necessary for the protection of the estate, and may grant to the optionee the right to occupy and work such mine or the interest of the estate in any such mine, but shall require the payment to said estate of such royalty as the court shall deem just, which royalty as paid may by the terms of such option be applied as payments upon such purchase price. Any such option must be approved by the district court.

History: En. Sec. 182, p. 287, L. 1877;
 re-en. Sec. 182, 2nd Div. Rev. Stat. 1879;
 re-en. Sec. 182, 2nd Div. Comp. Stat. 1887;
 re-en. Sec. 2661, C. Civ. Proc. 1895; re-en.

Sec. 7557, Rev. C. 1907; re-en. Sec. 10206,
 R. C. M. 1921; amd. Sec. 2, Ch. 84, L. 1941.
 Cal. C. Civ. Proc. Sec. 1530.

CHAPTER 30

SALES OF REAL ESTATE AND CONTRACTS FOR PURCHASE OF LAND

- Section 91-3001. Executor or administrator may sell property, when.
 91-3002. Verified petition for sale—what it may contain and to what it may refer.
 91-3003. Order directing interested persons to appear.
 91-3004. Service and publication of order.
 91-3005. Hearing by court, conduct of.
 91-3006. Administrator, executor and witnesses may be examined.
 91-3007. To sell real estate, or any part, when.
 91-3008. Order of sale—when to be made.
 91-3009. Contents of order of sale—conditions of sale—public or private.
 91-3010. Interested persons may apply for order of sale—form of petition.
 91-3011. Notice of sale.
 91-3012. Time and place.
 91-3013. Private sale of real estate, how made and notice—bids, when and how received.
 91-3014. Ninety per cent. of appraised value must be offered.
 91-3015. Purchase-money on sale on credit—how secured.
 91-3016. Return of proceedings—notice of hearing—setting aside sale—resale.
 91-3017. May file objections, when and who.

- 91-3018. When order of confirmation is to be made and when not.
- 91-3019. Conveyances.
- 91-3020. Order of confirmation—what to state.
- 91-3021. Sale may be postponed.
- 91-3022. Notice of postponement.
- 91-3023. Where payment of debts, etc., provided for by will.
- 91-3024. Sale without order under will—confirmation.
- 91-3025. Where provision by will insufficient.
- 91-3026. Estate subject to debts, etc.
- 91-3027. Contribution among legatees.
- 91-3028. Contract for purchase of lands may be sold, how.
- 91-3029. Conditions of sale.
- 91-3030. Purchaser to give bond.
- 91-3031. Executor or administrator to assign contract.
- 91-3032. Sales by executor or administrator of lands under mortgage or lien.
- 91-3033. The holder of the mortgage or lien may purchase the lands—his receipt to the amount of his claim a valid payment.
- 91-3034. Administrator and executor liable for misconduct in sale.
- 91-3035. Fraudulent sales.
- 91-3036. Limitation of actions for vacating sale, etc.
- 91-3037. To what cases preceding section not to apply.
- 91-3038. Account of sale to be returned.
- 91-3039. Executor, etc., not to be purchaser.

91-3001. (10210) **Executor or administrator may sell property, when.**

When a sale of the property is necessary to pay the allowance of the family, or the debts outstanding against the decedent, or the debts, expenses, or charges of administration, or legacies; or when it appears to the satisfaction of the court that it is for the advantage, benefit, and best interests of the estate, and those interested therein, including the minor heirs, if any, that the real estate, or some part thereof, be sold, the executor or administrator may sell any real as well as personal property of the estate, upon the order of the court or judge; and an application for the sale of real property may also embrace the sale of personal property.

History: En. Sec. 186, p. 288, L. 1877; re-en. Sec. 186, 2nd Div. Rev. Stat. 1879; re-en. Sec. 186, 2nd Div. Comp. Stat. 1887; amd. Sec. 2670, C. Civ. Proc. 1895; re-en. Sec. 7561, Rev. C. 1907; amd. Sec. 1, Ch. 3, L. 1915; re-en. Sec. 10210, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1536.

Continuous Nature of Proceedings

A proceeding for the sale of estate property is a continuous one, commencing with the filing of the petition and ending with the order of confirmation of the sale which is the only judgment or final order in the proceeding finally determining the rights of the parties and adjudicating that the property shall be sold to a certain person for a certain amount. Until then, the heirs' or devisees' title is not divested. Hence, up until the time of valid sale, the district court has the right to set aside the order of sale if it finds that action for the best interests of the estate and those interested therein. In *re Ryan's Estate*, 114 M 281, 290, 134 P 2d 732.

When Order of Confirmation Res Judicata

Where the statutory requirements rela-

tive to a sale of a decedent's real property up to the time of confirmation were observed, the order of confirmation becomes a judgment and *res judicata*, operates to divest the heirs of their title, and cures all errors and nonjurisdictional irregularities. *State ex rel. Eden v. Schneider*, 102 M 286, 292, 57 P 2d 783.

References

Cited or applied as sec. 7561, Revised Codes, before amendment, in *Plains Land & Improvement Co. v. Lynch*, 38 M 271, 283, 99 P 847; *Lamont v. Vinger*, 61 M 530, 538, 539, 202 P 769; In *re McLure's Estate*, 76 M 476, 487, 248 P 362; *Swanberg v. National Surety Co.*, 86 M 340, 351, 356, 283 P 761; *State v. McCracken*, 91 M 157, 163, 6 P 2d 869; In *re Walker's Estate*, 111 M 66, 70, 106 P 2d 341; *Montgomery v. First National Bank of Dillon*, 114 M 395, 411, 136 P 2d 760.

Executors and Administrators—319 et seq.

34 C.J.S. Executors and Administrators §§ 536, 555 et seq.

21 Am. Jur. 697-709, Executors and Administrators §§ 565-580.

91-3002. (10211) Verified petition for sale—what it may contain and to what it may refer. To obtain such order for the sale of real property, he must present a verified petition to the court or judge, setting forth the amount of personal property that has come to his hands, and how much thereof, if any, remains undisposed of; the debts outstanding against the decedent, as far as can be ascertained or estimated; the amount due upon the family allowance, or that will be due after the same has been in force one year; the debts, expenses, and charges of administration already accrued, and an estimate of what will or may accrue during the administration; a general description of all the real property of which the decedent died seized, or in which he had any interest, or in which the estate has acquired any interest, and the condition and value thereof; and the names of the legatees and devisees, if any, and of the heirs of the deceased, so far as known to the petitioner; and if said order for sale of real estate is petitioned for on the ground that it is for the advantage, benefit, and best interests of the estate, and those interested therein, including the minor heirs, if any, that a sale be made, the petition, in addition to the foregoing facts, must set forth in what way an advantage or benefit would accrue to the estate, and those interested therein, by such sale. If any of the matters here enumerated cannot be ascertained, it must be so stated in the petition; but a failure to set forth the facts showing the sale to be necessary will not invalidate the subsequent proceedings, if the defect be supplied by the proofs at the hearing, and the general facts showing such necessity be stated in the order.

History: En. Sec. 187, p. 289, L. 1877; re-en. Sec. 187, 2nd Div. Rev. Stat. 1879; re-en. Sec. 187, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2671, C. Civ. Proc. 1895; re-en. Sec. 7562, Rev. C. 1907; amd. Sec. 2, Ch. 3, L. 1915; re-en. Sec. 10211, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1537.

Defects in Proceeding Subject Only to Review on Appeal

Where the district court had jurisdiction to make an order of sale of a decedent's real estate, and the order itself was not void, any defects in the proceedings leading up to the sale were errors within jurisdiction, subject to review on appeal in the probate proceedings only, and not open to collateral attack by heirs seeking to set aside the sale for errors which amounted only to irregularities in the proceedings. *Plains Land & Improvement Co. v. Lynch*, 38 M 271, 289, 99 P 847.

Where the court has jurisdiction to make an order of sale, the remedy for any error committed by it in making such order is by appeal. Such error is not ground for collateral attack. *Plains Land & Improvement Co. v. Lynch*, 38 M 271, 290, 99 P 347.

Effect of a Petition so Defective as to Defeat Jurisdiction

If the petition upon which the order of

sale was made is so defective that the court did not acquire jurisdiction, the order may be assailed at any time upon a collateral as well as upon a direct attack; but if the facts stated in the petition were sufficient to confer jurisdiction upon the court to hear the application, its order directing a sale cannot be impeached upon a collateral attack. *Plains Land & Improvement Co. v. Lynch*, 38 M 271, 290, 99 P 847.

Operation and Effect

If the debts of the estate appear to exceed in amount the available means at hand with which to pay them, it may fairly be said to appear that a sale is necessary; and, if real estate is to be sold, the court or judge may properly consult the recitals of the petition as to the condition of the real estate to determine whether all or only a portion should be sold, and, if only a portion, then what particular portion. *Plains Land & Improvement Co. v. Lynch*, 38 M 271, 283, 99 P 847.

The authority of the probate court to order a sale of real property of an intestate is not included in its general jurisdiction over the administration but is special and limited and can be exercised only in the manner prescribed by the statute. *Lamont v. Vinger*, 61 M 530, 539, 202 P 769.

Petition Insufficient to Justify Order

A petition of heirs praying for an order requiring the administrator to sell real property (mining claims) of the estate, where all debts had been paid and there were ample funds to pay administration charges, etc., on the grounds that it was for the best interests of the estate in that a sale would save much hardship, embarrassment and expense for the heirs, and that a sale would fix the real value of the claims and thereby reduce the administrator's fees, held, insufficient to justify an order of sale when measured by the provisions of secs. 91-3001 and 91-3007. In *re Walker's Estate*, 111 M 66, 70, 106 P 2d 341.

Requirement That the "Condition" and "Value" of Real Estate be Set Forth Is Not Jurisdictional

The requirement of the statute, that the "condition" and "value" of the real estate be set forth in a petition to sell such real property to pay debts, is not jurisdictional; and, upon a collateral attack, defects in the petition with reference to such matters will not operate to set aside the proceedings had on the petition for leave to sell, after the sale has been made and the purchaser has, in good faith, paid the purchase price and gone into possession of the land sold. *Plains Land & Improvement Co. v. Lynch*, 38 M 271, 279, 99 P 847.

A petition to sell real estate of a decedent, which in its statement as to the "condition" thereof was so defective as to amount to an entire omission in this regard, and which as to its value set forth that it has been "appraised at the sum of two thousand dollars," the appraisal

being had less than one year prior to the presentation of the petition, was not so defective as to render the sale void on a collateral attack, in an action to quiet title brought by heirs of the estate. *Plains Land & Improvement Co. v. Lynch*, 38 M 271, 284, 99 P 847.

Scope of Investigation by Court on Order for Sale of Real Estate

The district court, when sitting in probate, on an application for an order of sale of real estate, may not enter into an investigation of questions of title to property included in the order, and alleged by objectors to the granting of such order to have been devised for a valuable consideration, and for that reason exempt from sale until after the disposition of all the other property belonging to the estate. In *re Tuohy's Estate*, 33 M 230, 243, 83 P 486.

Substantial Compliance Sufficient

The petition is sufficient if it substantially complies with the statute. *Plains Land & Improvement Co. v. Lynch*, 38 M 271, 277, 99 P 847.

Sufficiency of Petition

The sufficiency of the petition rests upon whether either of the reasons shown is among those contemplated by secs. 91-3001 and 91-3007. In *re Walker's Estate*, 111 M 66, 70, 106 P 2d 341.

References

In *re McLure's Estate*, 76 M 476, 487, 248 P 362; *State v. McCracken*, 91 M 157, 163, 6 P 2d 869.

21 Am. Jur. 711, *Executors and Administrators*, §§ 585 et seq.

91-3003. (10212) Order directing interested persons to appear. If it appears to the court or judge, from such petition, that it is necessary, or that it would be for the advantage, benefit, and best interests of the estate, and those interested therein, including the minor heirs, if any, to sell the whole or some portion of the real estate, for the purposes and reasons mentioned in the preceding section, or any of them, such petition must be filed, and an order thereupon made, directing all persons interested in the estate to appear before the court or judge, at a time and place specified, not less than fifteen, nor more than thirty days from the time of making such order, to show cause why an order should not be granted to the executor or administrator to sell so much of the real estate of the decedent as is necessary.

History: En. Sec. 188, p. 289, L. 1877; re-en. Sec. 188, 2nd Div. Rev. Stat. 1879; re-en. Sec. 188, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2672, C. Civ. Proc. 1895; re-en. Sec. 7563, Rev. C. 1907; amd. Sec. 3, Ch. 3, L. 1915; re-en. Sec. 10212, R. C. M. 1921;

amd. Sec. 1, Ch. 67, L. 1927. Cal. C. Civ. Proc. Sec. 1538.

Operation and Effect

Held, that where the proceedings had before the probate court on application

by an administrator for an order of sale of real property disclosed that no order to show cause was ever made, published or served upon the parties interested, the sale was void for want of jurisdiction and open to collateral attack. *Lamont v. Vinger*, 61 M 530, 538, 539, 202 P 769.

Id. Held, that the matter of procuring an order of sale of real property belonging to the estate of an intestate is one quasi in rem and not strictly in rem, and that therefore failure to make an order to show cause and to serve it substantially in the

manner required by the Codes rendered the sale void.

Id. In the absence of waiver, notice to the heirs of an intestate of a contemplated sale of real property is indispensable.

References

In re McGovern's Estate, 77 M 182, 198, 250 P 812; *Montgomery v. First National Bank of Dillon*, 114 M 395, 407, 136 P 2d 760.

91-3004. (10213) Service and publication of order. A copy of the order to show cause must be personally served on the heirs of the decedent, and any legatee or devisee, and any general guardian of a minor heir, legatee or devisee, providing they are residents of the county and can be found therein. If any such persons are not residents of the county, or if resident and cannot be found therein, the clerk of the court must forthwith deposit a copy of the order in the post office, registered, postage prepaid, directed to the person to be served, at his place of residence, such service to be at least ten (10) days before the time appointed for hearing the petition. In lieu of such personal service or service by mail such order may be published once a week for two (2) consecutive weeks in such newspaper in the county as the court or judge may direct. If all known heirs, legatees or devisees join in the petition for the sale or signify in writing their assent thereto, the notice may be dispensed with and the hearing may be had at any time.

History: En. Sec. 189, p. 289, L. 1877; re-en. Sec. 189, 2nd Div. Rev. Stat. 1879; re-en. Sec. 189, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2673, C. Civ. Proc. 1895; re-en. Sec. 7564, Rev. C. 1907; re-en. Sec. 10213, R. C. M. 1921; amd. Sec. 2, Ch. 67, L. 1927; amd. Sec. 1, Ch. 159, L. 1929; amd. Sec. 1,

Ch. 54, L. 1947. Cal. C. Civ. Proc. Sec. 1539.

References

In re Walker's Estate, 111 M 66, 73, 106 P 2d 341; *Montgomery v. First National Bank*, 114 M 395, 407, 136 P 2d 760.

91-3005. (10214) Hearing by court, conduct of. The court or judge, at the time appointed in such order, or at such other time to which the hearing may be postponed, upon satisfactory proof of personal service upon the heirs, legatees, devisees or general guardian of any minor heir, devisee or legatee, and satisfactory proof of service by registered mail upon any of such parties not residents of the county, or if resident and cannot be found therein, or by publication of a copy of the order, by affidavit or otherwise, if the consent in writing to such sale of all parties interested is not filed, must proceed to hear the petition, and hear and examine the allegations and proofs of the petitioners, and of all persons interested in the estate who may oppose the application.

History: En. Sec. 190, p. 289, L. 1877; re-en. Sec. 190, 2nd Div. Rev. Stat. 1879; re-en. Sec. 190, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2674, C. Civ. Proc. 1895; re-en. Sec. 7565, Rev. C. 1907; re-en. Sec. 10214,

R. C. M. 1921; amd. Sec. 2, Ch. 159, L. 1929. Cal. C. Civ. Proc. Sec. 1540.

21 Am. Jur. 717, *Executors and Administrators*, §§ 597-600.

91-3006. (10215) Administrator, executor and witnesses may be examined. The executor, administrator, and witnesses may be examined on

oath by either party, and process to compel them to attend and testify may be issued by the court or judge, in the same manner and with like effect as in other cases.

History: En. Sec. 191, p. 289, L. 1877; re-en. Sec. 191, 2nd Div. Rev. Stat. 1879; re-en. Sec. 191, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2675, C. Civ. Proc. 1895; re-en. Sec. 7566, Rev. C. 1907; re-en. Sec. 10215, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1541.

91-3007. (10216) To sell real estate, or any part, when. If it appears necessary, or that it is for the advantage, benefit, and best interests of the estate, and those interested therein, including the minor heirs, if any, to sell part of the real estate, and that by a sale thereof the residue of the estate, real or personal, or some specific part thereof, would be greatly injured or diminished in value, or subjected to expense, or rendered unprofitable, or that after any such sale the residue would be so small in quantity or value, or would be of such character, with reference to its future disposition among the heirs or devisees, as clearly to render it for the best interest of all concerned that the same should be sold, the court or judge may authorize the sale of the whole estate, or of any part thereof, necessary and for the best interest of all concerned.

History: En. Sec. 192, p. 290, L. 1877; re-en. Sec. 192, 2nd Div. Rev. Stat. 1879; re-en. Sec. 192, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2676, C. Civ. Proc. 1895; re-en. Sec. 7567, Rev. C. 1907; amd. Sec. 4, Ch. 3, L. 1915; re-en. Sec. 10216, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1542.

Statutes Controlling

Where sales of estate property were made in an invalid manner and the executor in reporting assets on hand available for payment of certain claims treated the property as cash in his accounting, but in

fact was holding it as security for payment of the claims, the property could only be applied to their payment in the manner outlined by the statutes after being converted into cash by probate sales. *Montgomery v. Gilbert*, 111 M 250, 277, 108 P 2d 616.

References

Lamont v. Vinger, 61 M 530, 539, 202 P 769; *In re McGovern's Estate*, 77 M 182, 198, 250 P 812; *In re Walker's Estate*, 111 M 66, 70, 106 P 2d 341.

91-3008. (10217) Order of sale—when to be made. If the court or judge is satisfied, after a full hearing upon the petition and an examination of the proofs and allegations of the parties interested, that a sale of the whole or some portion of the real estate is necessary, for any of the causes mentioned in this chapter, or that a sale of the whole or some portion of the real estate is for the advantage, benefit, and best interests of the estate, and those interested therein, including the minor heirs, if any, or if such sale be assented to by all of the persons interested, an order must be made to sell the whole, or so much and such parts of the real estate described in the petition, as the court or judge shall judge necessary or beneficial.

History: En. Sec. 193, p. 290, L. 1877; re-en. Sec. 193, 2nd Div. Rev. Stat. 1879; re-en. Sec. 193, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2677, C. Civ. Proc. 1895; re-en. Sec. 7568, Rev. C. 1907; amd. Sec. 5, Ch. 3, L. 1915; re-en. Sec. 10217, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1543.

Conclusiveness of purchaser at judicial sale of provisions of order or decree of confirmation regarding terms and conditions. 95 ALR 1492.

Right or duty of executor or administrator to contest order directing sale of real estate for payment of debts. 126 ALR 903.

21 Am. Jur. 720, Executors and Administrators, §§ 601-607.

91-3009. (10218) Contents of order of sale—conditions of sale—public or private. The order of sale must describe the lands to be sold and the

terms of sale which may be for cash, or for part cash and the balance on a credit not exceeding five (5) years, payable in gross or in installments, with interest, as the court or judge may direct. The land may be sold in one parcel or in subdivisions, as the executor or administrator shall judge most beneficial to the estate, unless the court or judge otherwise specially directs. If it appears that any part of such real estate has been devised, and not charged in such devise with the payment of debts or legacies, the court or judge must order the remainder to be sold before that so devised. Every such sale must be ordered to be made at public auction, unless, in the opinion of the court or judge, it would benefit the estate to sell the whole or some part of such real estate at private sale. The court or judge may, if the same is asked for in the petition, order or direct such real estate, or any part thereof, to be sold at either public or private sale, if the executor or administrator shall deem it to be most beneficial for the estate. If the executor or administrator neglects or refuses to make a sale under the order, and as directed therein, he may be compelled to sell, by order of the court or judge, made on motion, after due notice by any party interested.

History: En. Sec. 194, p. 290, L. 1877; re-en. Sec. 194, 2nd Div. Rev. Stat. 1879; re-en. Sec. 194, 2nd Div. Comp. Stat. 1887; amd. Sec. 2678, C. Civ. Proc. 1895; re-en. Sec. 7569, Rev. C. 1907; re-en. Sec. 10218, R. C. M. 1921; amd. Sec. 1, Ch. 49, L. 1943. Cal. C. Civ. Proc. Sec. 1544.

Operation and Effect

Where real estate of a deceased person was sold, on the petition of the administratrix, for cash and for considerably more than its appraised value, and the court, after a full hearing, confirmed the sale,

the failure of the order of sale to state the terms thereof was cured by such confirmation. *Plains Land & Improvement Co. v. Lynch*, 38 M 271, 285, 99 P 847.

The court may make its order of sale in the alternative. It may grant authority to sell either at public or private sale. *Plains Land & Improvement Co. v. Lynch*, 38 M 271, 285, 99 P 847.

References

Cited or applied as sec. 2678, Code of Civil Procedure, in *In re Tuohy's Estate*, 33 M 230, 245, 83 P 486.

91-3010. (10219) Interested persons may apply for order of sale—form of petition. If the executor or administrator neglects to apply for an order of sale when it is necessary, or when it is for the advantage, benefit, and best interests of the estate, and those interested therein, including the minor heirs, if any, that the real estate, or some portion thereof, be sold, any person in interest may make application therefor, in the same manner as the executor or administrator, and notice thereof must be given to the executor or administrator before the hearing. The petition of such applicant must contain as many of the matters set forth in section 91-3002 as he can ascertain, and the order of sale must fix the period of time within which the executor or administrator must make the sale.

History: En. Sec. 195, p. 291, L. 1877; re-en. Sec. 195, 2nd Div. Rev. Stat. 1879; re-en. Sec. 195, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2679, C. Civ. Proc. 1895; re-en. Sec. 7570, Rev. C. 1907; amd. Sec. 6, Ch. 3, L. 1915; re-en. Sec. 10219, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1545.

Where Creditors Lost Their Right to Sell by Laches

As against the contention that the right conferred on a creditor by this section to

sell decedent's property to satisfy their claims, is optional and not obligatory, and there can be no laches where there is no duty to act, and that such is the general rule stated in *In re Stinger's Estate*, 61 M 173, 201 P 693, 700, held, where there had been a delay for over 21 years before creditors filed their petition for sale, that in view of all the facts and circumstances, they voluntarily abandoned any right given them by statute to sell the estate property, and their claims were

barred by laches. *Montgomery v. First National Bank of Dillon*, 114 M 395, 410, 136 P 2d 760.

References

In *re McLure's Estate*, 76 M 476, 487, 248 P 362.

91-3011. (10220) Notice of sale. When a sale is ordered, and it is to be made at public auction, notice of the time and place must be posted in three of the most public places in the county in which the land is situated, and published once in a newspaper, if there be one printed in the same county, but if none, then in such paper as the court or judge may direct, not less than seven days before the date of sale; the lands and tenements to be sold must be described with common certainty in the notice.

History: En. Sec. 196, p. 291, L. 1877; re-en. Sec. 196, 2nd Div. Rev. Stat. 1879; re-en. Sec. 196, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2680, C. Civ. Proc. 1895; re-en. Sec. 7571, Rev. C. 1907; re-en. Sec. 10220, R. C. M. 1921; amd. Sec. 3, Ch. 67, L. 1927. Cal. C. Civ. Proc. Sec. 1547.

Sale Set Aside for Defective Description

Where errors in the description of farm lands of an estate covering some 1400 acres

appeared in the order of sale and were carried into the notice of sale, such as that some 115 acres in a section were not described at all, that over 200 acres in a given section were sold without any identification, that lands in range 3 west, were sold as in range 3 east, etc., the sale and order confirming it will be set aside. In *re Ryan's Estate*, 114 M 281, 286, 134 P 2d 732.

91-3012. (10221) Time and place. Sales at public auction must be made in the county where the land is situated, but when the land is situated in two or more counties, it may be sold in either. The sale must be made between the hours of nine o'clock in the morning and the setting of the sun on the same day, and must be made on the day named in the notice of sale, unless the same is postponed.

History: En. Sec. 197, p. 291, L. 1877; re-en. Sec. 197, 2nd Div. Rev. Stat. 1879; re-en. Sec. 197, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2681, C. Civ. Proc. 1895; re-en. Sec. 7572, Rev. C. 1907; re-en. Sec. 10221, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1548.

Executors and Administrators—360, 363. 34 C.J.S. Executors and Administrators §§ 587, 593-597.

21 Am. Jur. 726, Executors and Administrators, § 615.

91-3013. (10222) Private sale of real estate, how made and notice—bids, when and how received. When a sale of real estate is ordered to be made at private sale, notice of the same must be posted up in three of the most public places in the county in which the land is situated, and published in a newspaper, if there be one printed in the same county, if none, then in such paper as the court or judge may direct, for two weeks successively next before the day on or after which the sale is to be made, in which the lands and tenements to be sold must be described with common certainty. The notice must state a day on or after which the sale will be made, and a place where offers or bids will be received. The day last referred to must be at least fifteen days from the first publication of notice, and the sale must not be made before that day, but must be made within six months thereafter. The bids or offers must be in writing, and may be left at the place designated in the notice, or delivered to the executor or administrator personally, or may be filed in the office of the clerk of the court to which the return of sale must be made, at any time after the first publication of the notice, and before the making of the sale. If it be shown that it will be for the best interests of the estate, the court or judge may, by an order, shorten the time of notice, which shall not,

however, be less than one week, and may provide that the sale may be made on or after a day less than fifteen, but not less than eight days from the first publication of the notice, in which case the notice of sale and the sale may be made to correspond with such order.

History: En. Sec. 198, p. 292, L. 1877; re-en. Sec. 198, 2nd Div. Rev. Stat. 1879; re-en. Sec. 198, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2682, C. Civ. Proc. 1895; re-en. Sec. 7573, Rev. C. 1907; re-en. Sec. 10222, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1549.

Executors and Administrators \Rightarrow 360-366.
34 C.J.S. Executors and Administrators
§§ 587, 592-597, 599, 600.
21 Am. Jur. 725, Executors and Administrators, § 613.

91-3014. (10223) Ninety per cent. of appraised value must be offered.

No sale of real estate at private sale shall be confirmed by the court or judge, unless the sum offered is at least ninety per cent. of the appraised value thereof, nor unless such real estate has been appraised within one year of the time of such sale. If it has not been so appraised, or if the court or judge is satisfied that the appraisal is too high or too low, appraisers must be appointed, and they must make an appraisal thereof in the same manner as in case of an original appraisal of an estate. This may be done at any time before the sale or the confirmation thereof.

History: En. Sec. 199, p. 292, L. 1877; re-en. Sec. 199, 2nd Div. Rev. Stat. 1879; re-en. Sec. 199, 2nd Div. Comp. Stat. 1887;

re-en. Sec. 2683, C. Civ. Proc. 1895; re-en. Sec. 7574, Rev. C. 1907; re-en. Sec. 10223, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1550.

91-3015. (10224) Purchase-money on sale on credit—how secured. The executor or administrator must, when the sale is made upon a credit, take the notes of the purchaser for the purchase-money, with a mortgage on the property to secure the payment.

History: En. Sec. 200, p. 292, L. 1877; re-en. Sec. 200, 2nd Div. Rev. Stat. 1879; re-en. Sec. 200, 2nd Div. Comp. Stat. 1887;

re-en. Sec. 2684, C. Civ. Proc. 1895; re-en. Sec. 7575, Rev. C. 1907; re-en. Sec. 10224, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1551.

91-3016. (10225) Return of proceedings — notice of hearing — setting aside sale — resale. The executor or administrator, after making any sale of real estate, must make a return of his proceedings to the court, which must be filed in the office of the clerk at any time subsequent to the sale. A hearing upon the return of the proceedings may be asked for in the return or by petition subsequently, and thereupon the court or judge must fix the day for the hearing, of which notice thereof of at least ten days must be given by the clerk, by notices posted in three public places in the county, or by publication in a newspaper, or both, as the court or judge shall direct, and must briefly indicate the land sold, the sum for which it was sold, and must refer to the return for further particulars. Upon the hearing, the court or judge must examine the return and witnesses in relation to the same, and if the proceedings were unfair, or the sum bid disproportionate to the value, and if it appears that a sum exceeding such bid at least ten per cent., exclusive of the expenses of a new sale, may be obtained, the court or judge may vacate the sale and direct another to be had, of which notice must be given, and the sale in all respects conducted as if no previous sale had taken place. If an offer of ten per cent. more in amount than that named in the return be made to the court, in writing, by a responsible person, it is in the discretion of the court or judge to

accept such offer and confirm the sale to such person, or to order a new sale.

History: En. Sec. 201, p. 293, L. 1877; re-en. Sec. 201, 2nd Div. Rev. Stat. 1879; re-en. Sec. 201, 2nd Div. Comp. Stat. 1887; amd. Sec. 2685, C. Civ. Proc. 1895; re-en. Sec. 7576, Rev. C. 1907; re-en. Sec. 10225, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1552.

Operation and Effect

Where the probate court refuses to confirm an administrator's sale of real property made under its order, it must under this section, order a resale. In re McLure's Estate, 76 M 476, 487 et seq., 248 P 362.

Id. The district court, under this section, may set aside an administrator's sale of the decedent's real property if it is made to appear that the proceedings were unfair, or that the bid was disproportionate to its value and that, on a resale, a bid exceeding that received by at least ten per cent might be had.

Id. If an administrator's sale of real property, may, under this section, be set aside for inadequacy of consideration alone

without a showing that on resale a bid exceeding that received by at least ten per cent may be had, the rule can exist only in cases where it is made to appear that the bid made is so grossly inadequate as to raise a presumption of fraud and unfairness in the conduct of the sale.

Under this section, the probate court may, if at the hearing upon the return of an executor or administrator of a sale of estate real property an offer of at least ten per cent exceeding the bid of a purchaser be made, in its discretion accept such higher bid without ordering a resale. *State v. McCracken*, 91 M 157, 163, 6 P 2d 869.

References

Cited or applied as sec. 2685, Code of Civil Procedure, in *Goodell v. Sanford*, 31 M 163, 172, 77 P 522; as sec. 7576, Revised Codes, in *State ex rel. King v. District Court*, 42 M 182, 184, 111 P 717.

91-3017. (10226) May file objections, when and who. When return of the sale is made and filed, any person interested in the estate may file written objections to the confirmation thereof, and may be heard thereon, when the return is heard by the court or judge, and may produce witnesses in support of his objections.

History: En. Sec. 202, p. 293, L. 1877; re-en. Sec. 202, 2nd Div. Rev. Stat. 1879; re-en. Sec. 202, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2686, C. Civ. Proc. 1895; re-en. Sec. 7577, Rev. C. 1907; re-en. Sec. 10226, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1553.

Operation and Effect

While an administrator is not one of the "persons interested in the estate" who may file objections to the confirmation of a sale of the estate under this section, and his recommendation when making return of the sale that the sale be not con-

firmed may have been insufficient to give the court jurisdiction to make an order refusing to confirm, where the bidders by a petition filed subsequent to the return asked that a hearing be had thereon as they could do under this section as parties most interested in the confirmation, it was vested with jurisdiction to proceed. In re McLure's Estate, 76 M 476, 488, 248 P 362.

Executors and Administrators—375.

34 C.J.S. Executors and Administrators § 607 et seq.

91-3018. (10227) When order of confirmation is to be made and when not. If it appears to the court or judge that the sale was legally made and fairly conducted, and that the sum bid was not disproportionate to the value of the property sold, and that a greater sum, as above specified, cannot be obtained, or if the increased bid mentioned in section 91-3016 be made and accepted by the court or judge, the court or judge must make an order confirming the sale, and directing conveyances to be executed. The sale, from that time, is confirmed and valid, and a certified copy of the order confirming it, and directing conveyances to be executed, must be recorded in the office of the county clerk of the county in which the land is situated. If, after the confirmation, the purchaser neglects or refuses to comply with the terms of sale, the court or judge may, on motion of the

executor or administrator, and after notice to the purchaser, order a resale to be made of the property. If the amount realized on such resale does not cover the bid and the expenses of the previous sale, such purchaser is liable for the deficiency to the estate.

History: En. Sec. 203, p. 293, L. 1877; re-en. Sec. 203, 2nd Div. Rev. Stat. 1879; re-en. Sec. 203, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2687, C. Civ. Proc. 1895; re-en. Sec. 7578, Rev. C. 1907; re-en. Sec. 10227, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1554.

No Time Set for Making Motion for Resale

This is a special statute and fixes no time within which the "motion" must be made for order of resale, as does the general statute (sec. 93-3905) for setting aside judgments and the like. State ex rel. Eden v. Schneider, 102 M 286, 294, 57 P 2d 783.

Operation and Effect

This section, being the only provision of the code respecting the duties of a district court, sitting in probate, on default of a purchaser to comply with the terms of sale, such court had no power to set aside a guardian's sale of the property of the ward, and to authorize the guardian to retake possession thereof, on the failure of the purchaser to comply with the terms of purchase. State ex rel. Donovan v. District Court, 27 M 415, 418, 71 P 401.

It is the order of confirmation which

finally operates to divest the heirs of their title and to secure the property to the purchaser. All errors, irregularities, and defects, not jurisdictional, are cured by confirmation. Plains Land & Improvement Co. v. Lynch, 38 M 271, 286, 99 P 847.

When Order of Confirmation Res Judicata

Where the statutory requirements relative to a sale of a decedent's real property up to the time of confirmation were observed, the order of confirmation becomes a judgment and res judicata, operates to divest the heirs of their title, and cures all errors and nonjurisdictional irregularities. State ex rel. Eden v. Schneider, 102 M 286, 292, 57 P 2d 783.

References

Cited or applied as sec. 2687, Code of Civil Procedure, in Goodell v. Sanford, 31 M 163, 172, 77 P 522; In re McLure's Estate, 76 M 476, 489, 248 P 362; Swenberg v. National Surety Co., 86 M 340, 351, 283 P 761; State v. McCracken, 91 M 157, 164, 6 P 2d 969.

21 Am. Jur. 737, Executors and Administrators, §§ 633-637.

91-3019. (10228) Conveyances. Conveyances must thereupon be executed to the purchaser by the executor or administrator, and they must refer to the orders of the court authorizing and confirming the sale of the property of the estate, and directing conveyances thereof to be executed, and to the record of the order of confirmation in the office of the county clerk, either by the date of such recording, or by the date, volume, and page of the record, and such reference shall have the same effect as if the orders were at large inserted in the conveyance. Conveyances so made convey all the right, title, interest, and estate of the decedent, in the premises, at the time of his death; if prior to the sale, by operation of law or otherwise, the estate has acquired any right, title, or interest, other than or in addition to that of the decedent, it also passes by such conveyances.

History: En. Sec. 204, p. 294, L. 1877; re-en. Sec. 204, 2nd Div. Rev. Stat. 1879; re-en. Sec. 204, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2688, C. Civ. Proc. 1895; re-en. Sec. 7579, Rev. C. 1907; re-en. Sec. 10228, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1555.

Operation and Effect

Under this section, requiring an executor, after the district court sitting in probate makes an order confirming a sale of estate real property, to execute a conveyance to the purchaser, execution of the

conveyance is a mere ministerial act, performance of which may be compelled by mandamus. State v. McCracken, 91 M 157, 165, 6 P 2d 869.

When Mandamus Lies to Compel Conveyance

After confirmation of the sale by the court with direction to convey, mandamus lies to compel an administrator to convey real property to the purchaser, notwithstanding petitioner did not appeal from an order setting the sale and confirmation

aside, provided the latter order was void because the order of confirmation had become *res judicata*. *State ex rel. Eden v. Schneider*, 102 M 286, 293, 57 P 2d 783.

Writ of Mandate Dismissed after Sale Set Aside

Court dismissed purchaser's application for writ of mandate to compel conveyance of real estate where purchaser failed after long delay of three years to pay the purchase price and the sale had been set aside in the meantime, on the ground that the matters involved were *res judicata*.

State ex rel. Eden v. Schneider, 102 M 286, 294, 57 P 2d 783.

References

In *re McLure's Estate*, 76 M 476, 486, 248 P 362.

Executors and Administrators—393 et seq.

34 C.J.S. Executors and Administrators § 647.

21 Am. Jur. 765, Executors and Administrators, §§ 680 et seq.

91-3020. (10229) Order of confirmation—what to state. Before an order is entered confirming the sale, it must be proved to the satisfaction of the court or judge that notice was given of the sale as prescribed, and the order of confirmation must show that such proof was made.

History: En. Sec. 205, p. 294, L. 1877; re-en. Sec. 205, 2nd Div. Rev. Stat. 1879; re-en. Sec. 205, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2689, C. Civ. Proc. 1895; re-en. Sec. 7580, Rev. C. 1907; re-en. Sec. 10229, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1556.

Sale Set Aside for Defective Description

Where errors in the description of farm lands of an estate covering some 1400 acres

appeared in the order of sale and were carried into the notice of sale, such as that some 115 acres in a section were not described at all, that over 200 acres in a given section were sold without any identification, that lands in range 3 west, were sold as in range 3 east, etc., the sale and order confirming it will be set aside. In *re Ryan's Estate*, 114 M 281, 286, 134 P 2d 732.

91-3021. (10230) Sale may be postponed. If, at the time appointed for the sale, the executor or administrator deems it for the interest of all persons concerned therein that the same be postponed, he may postpone it from time to time, not exceeding in all three months.

History: En. Sec. 206, p. 294, L. 1877; re-en. Sec. 206, 2nd Div. Rev. Stat. 1879; re-en. Sec. 206, 2nd Div. Comp. Stat. 1887;

re-en. Sec. 2690, C. Civ. Proc. 1895; re-en. Sec. 7581, Rev. C. 1907; re-en. Sec. 10230, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1557.

91-3022. (10231) Notice of postponement. In case of a postponement, notice thereof must be given by a public declaration, at the time and place first appointed for the sale, and if the postponement be for more than one day, further notice must be given, by posting in three or more public places in the county where the land is situated, or publishing the same, or both, as the time and circumstances will admit.

History: En. Sec. 207, p. 295, L. 1877; re-en. Sec. 207, 2nd Div. Rev. Stat. 1879; re-en. Sec. 207, 2nd Div. Comp. Stat. 1887;

re-en. Sec. 2691, C. Civ. Proc. 1895; re-en. Sec. 7582, Rev. C. 1907; re-en. Sec. 10231, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1558.

91-3023. (10232) Where payment of debts, etc., provided for by will. If the testator makes provision by his will, or designates the estate to be appropriated for the payment of his debts, the expenses of administration, or family expenses, they must be paid according to such provision or designation, out of the estate thus appropriated, so far as the same is sufficient.

History: En. Sec. 208, p. 295, L. 1877; re-en. Sec. 208, 2nd Div. Rev. Stat. 1879; re-en. Sec. 208, 2nd Div. Comp. Stat. 1887;

re-en. Sec. 2692, C. Civ. Proc. 1895; re-en. Sec. 7583, Rev. C. 1907; re-en. Sec. 10232, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1560.

91-3024. (10233) Sale without order under will—confirmation. When property is directed by the will to be sold, or authority is given in the

will to sell property, the executor may sell any property of the estate without order of the court or judge, and at either public or private sale, and with or without notice, as the executor may determine; but the executor must make return of such sales as in other cases; and if directions are given in the will as to the mode of selling, or the particular property to be sold, such directions must be observed. In either case no title passes unless the sale be confirmed by the court or judge.

History: En. Sec. 209, p. 295, L. 1877; re-en. Sec. 209, 2nd Div. Rev. Stat. 1879; re-en. Sec. 209, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2693, C. Civ. Proc. 1895; re-en. Sec. 7584, Rev. C. 1907; re-en. Sec. 10233, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1561.

Operation and Effect

A private sale by an executrix under a power in the will to manage the estate as she should deem best, and for that purpose to sell any portion or the whole thereof,

which is afterwards confirmed by the court, is not a judicial sale, but a sale under the power. *Goodell v. Sanford*, 31 M 163, 171, 77 P 522.

Executors and Administrators—138 et seq., 158 et seq.

33 C.J.S. Executors and Administrators §§ 274 et seq., 305 et seq.

21 Am. Jur. 767, Executors and Administrators, §§ 686 et seq.

91-3025. (10234) Where provision by will insufficient. If the provision made by the will, or the estate appropriated therefor, is insufficient to pay the debts, expenses of administration, and family expenses, that portion of the estate not devised or disposed of by the will, if any, must be appropriated and disposed of for that purpose, according to the provisions of this chapter.

History: En. Sec. 210, p. 296, L. 1877; re-en. Sec. 210, 2nd Div. Rev. Stat. 1879; re-en. Sec. 210, 2nd Div. Comp. Stat. 1887;

re-en. Sec. 2694, C. Civ. Proc. 1895; re-en. Sec. 7585, Rev. C. 1907; re-en. Sec. 10234, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1562.

91-3026. (10235) Estate subject to debts, etc. The estate, real and personal, given by will to legatees or devisees, is liable for the debts, expenses of administration, and family expenses, in proportion to the value or amount of the several devises, or legacies, but specific devises or legacies are exempt from such liability, if it appears to the court or judge necessary to carry into effect the intention of the testator, and there is other sufficient estate.

History: En. Sec. 211, p. 296, L. 1877; re-en. Sec. 211, 2nd Div. Rev. Stat. 1879; re-en. Sec. 211, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2695, C. Civ. Proc. 1895; re-en. Sec. 7586, Rev. C. 1907; re-en. Sec. 10235, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1563.

References

Montgomery v. Gilbert, 77 F 2d 39.

Wills—827 et seq.

69 C.J. Wills § 2557 et seq.

91-3027. (10236) Contribution among legatees. When an estate given by will has been sold for the payment of debts or expenses, all the devisees or legatees must contribute according to their respective interests to the devisees or legatees whose devise or legacy has been taken therefor, and the court or judge, when distribution is made, must, by order for that purpose, settle the amount of the several liabilities, and order the amount each person shall contribute, and reserve the same from their distributive shares, respectively, for the purpose of paying such contribution.

History: En. Sec. 212, p. 296, L. 1877; re-en. Sec. 212, 2nd Div. Rev. Stat. 1879; re-en. Sec. 212, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2696, C. Civ. Proc. 1895; re-en. Sec. 7587, Rev. C. 1907; re-en. Sec. 10236,

R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1564.

Wills—848.

69 C.J. Wills § 2584.

91-3028. (10237) Contract for purchase of lands may be sold, how. If a decedent, at the time of his death, was possessed of a contract for the purchase of lands, his interest in such land and under such contracts may be sold on the application of his executor or administrator, in the same manner as if he had died seized of such land, and the same proceedings may be had for the purpose as are prescribed in this chapter for the sale of lands of which he died seized, except as hereinafter provided.

History: En. Sec. 213, p. 297, L. 1877; re-en. Sec. 213, 2nd Div. Rev. Stat. 1879; re-en. Sec. 213, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2697, C. Civ. Proc. 1895; re-en. Sec. 7588, Rev. C. 1907; re-en. Sec. 10237, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1565. Executors and Administrators—329 (1). 34 C.J.S. Executors and Administrators §§ 549-551.

91-3029. (10238) Conditions of sale. The sale must be made subject to all payments that may thereafter become due on such contracts, and if there are any such, the sale must not be confirmed by the court or judge until the purchasers execute a bond to the executor or administrator for the benefit and indemnity of himself and of the persons entitled to the interest of the decedent in the lands so contracted for, in double the whole amount of payments thereafter to become due on such contract, with such sureties as the court or judge shall approve.

History: En. Sec. 214, p. 297, L. 1877; re-en. Sec. 214, 2nd Div. Rev. Stat. 1879; re-en. Sec. 214, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2698, C. Civ. Proc. 1895; re-en. Sec. 7589, Rev. C. 1907; re-en. Sec. 10238, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1566.

91-3030. (10239) Purchaser to give bond. The bond must be conditioned that the purchaser will make all payments for such land that become due after the date of the sale, and will fully indemnify the executor or administrator, and the persons so entitled, against all demands, costs, charges, and expenses, by reason of any covenant or agreement contained in such contract.

History: En. Sec. 215, p. 297, L. 1877; re-en. Sec. 215, 2nd Div. Rev. Stat. 1879; re-en. Sec. 215, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2699, C. Civ. Proc. 1895; re-en. Sec. 7590, Rev. C. 1907; re-en. Sec. 10239, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1567.

91-3031. (10240) Executor or administrator to assign contract. Upon the confirmation of the sale, the executor or administrator must execute to the purchaser an assignment of the contract, which vests in the purchaser, his heirs and assigns, all the right, title, and interest of the estate, or of the persons entitled to the interest of the decedent, in the lands sold at the time of the sale; and the purchaser has the same rights and remedies against the vendor of such land as the decedent would have if he were living.

History: En. Sec. 216, p. 298, L. 1877; re-en. Sec. 216, 2nd Div. Rev. Stat. 1879; re-en. Sec. 216, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2700, C. Civ. Proc. 1895; re-en. Sec. 7591, Rev. C. 1907; re-en. Sec. 10240, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1568.

91-3032. (10241) Sales by executor or administrator of lands under mortgage or lien. When any sale is made by an executor or administrator, pursuant to provisions of this chapter, of lands subject to any mortgage or other lien, which is a valid claim against the estate of the decedent, and has been presented and allowed, the purchase-money must be applied, after

paying the necessary expenses of the sale, first, to the payment and satisfaction of the mortgage or lien, and the residue, if any, in due course of administration. The application of the purchase-money to the satisfaction of the mortgage or lien must be made without delay; and the land is subject to such mortgage or lien until the purchase-money has been actually so applied. No claim against any estate, which has been presented and allowed, is affected by the statute of limitations, pending the proceedings for the settlement of the estate. The purchase-money, or so much thereof as may be sufficient to pay such mortgage or lien, with interest, and any lawful costs and charges thereon, may be paid into the court, to be received by the clerk thereof, whereupon the mortgage or lien upon the land must cease, and the purchase-money must be paid over by the clerk of the court without delay, in payment of the expenses of the sale, and in satisfaction of the debt to secure which the mortgage or other lien was taken, and the surplus, if any, at once returned to the executor or administrator, unless for good cause shown, after notice to the executor or administrator, the court or judge otherwise directs.

History: En. Sec. 217, p. 298, L. 1877; re-en. Sec. 217, 2nd Div. Rev. Stat. 1879; re-en. Sec. 217, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2701, C. Civ. Proc. 1895; re-en. Sec. 7592, Rev. C. 1907; re-en. Sec. 10241, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1569. Executors and Administrators 402 et seq.; Limitation of Actions 132. 34 C.J.S. Executors and Administrators § 656; 37 C.J. Limitations of Actions § 560.

91-3033. (10242) The holder of the mortgage or lien may purchase the lands—his receipt to the amount of his claim a valid payment. At any sale, under order of the court or judge, of lands upon which there is a mortgage or lien, the holder thereof may become the purchaser, and his receipt for the amount due him from the proceeds of the sale is a payment pro tanto. If the amount for which he purchased the property is insufficient to defray the expenses and discharge his mortgage or lien, he must pay to the court, or the clerk thereof, an amount sufficient to pay such expenses.

History: En. Sec. 218, p. 298, L. 1877; re-en. Sec. 218, 2nd Div. Rev. Stat. 1879; re-en. Sec. 218, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2702, C. Civ. Proc. 1895; re-en. Sec. 7593, Rev. C. 1907; re-en. Sec. 10242, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1570. Executors and Administrators 365, 368. 34 C.J.S. Executors and Administrators §§ 599, 601.

91-3034. (10243) Administrator and executor liable for misconduct in sale. If there is any neglect or misconduct in the proceedings of the executor in relation to any sale, by which any person interested in the estate suffers damage, the party aggrieved may recover the same in an action upon the bond of the executor or administrator, or otherwise.

History: En. Sec. 219, p. 299, L. 1877; re-en. Sec. 219, 2nd Div. Rev. Stat. 1879; re-en. Sec. 219, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2703, C. Civ. Proc. 1895; re-en. Sec. 7594, Rev. C. 1907; re-en. Sec. 10243, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1571. real property of his estate, in contemplation of the statutes which form a part of the contract, and even where an additional bond is required on the sale of such property, the qualifying bond is jointly liable with it for the proceeds. *Swanberg v. National Surety Co.*, 86 M 340, 355, 283 P 761.

Operation and Effect

The general or qualifying bond of an administrator may in any case be wholly responsible for the proceeds of the sale of

References

Montgomery v. Gilbert, 77 F 2d 39.

Executors and Administrators \S 391.

34 C.J.S. Executors and Administrators
 $\S\S$ 661, 663-666.

91-3035. (10244) Fraudulent sales. Any executor or administrator who fraudulently sells any real estate of a decedent, contrary to or otherwise than under the provisions of this chapter, is liable in double the value of the land sold, as liquidated damages, to be recovered in an action by the person having an estate of inheritance therein.

History: En. Sec. 220, p. 299, L. 1877; re-en. Sec. 220, 2nd Div. Rev. Stat. 1879; re-en. Sec. 220, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2704, C. Civ. Proc. 1895; re-en. Sec. 7595, Rev. C. 1907; re-en. Sec. 10244, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1572.

References

Montgomery v. Gilbert, 77 F 2d 39.

91-3036. (10245) Limitation of actions for vacating sale, etc. No action for the recovery of any estate sold by an executor or administrator, under the provisions of this chapter, can be maintained by any heir or other person claiming under the decedent, unless it be commenced within three years next after the settlement of the final account of the executor or administrator. An action to set aside the sale may be instituted and maintained at any time within three years from the discovery of the fraud, or other grounds upon which the action is based.

History: En. Sec. 221, p. 299, L. 1877; re-en. Sec. 221, 2nd Div. Rev. Stat. 1879; re-en. Sec. 221, 2nd Div. Comp. Stat. 1887; amd. Sec. 2705, C. Civ. Proc. 1895; re-en. Sec. 7596, Rev. C. 1907; re-en. Sec. 10245, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1573.

heir must commence his action had expired, but within the three-year period after reaching his majority (sec. 91-3037), was not barred. Lamont v. Vinger, 61 M 530, 536 et seq., 202 P 769.

References

Montgomery v. Gilbert, 77 F 2d 39.

Operation and Effect

An action to recover real property sold by an administrator under an alleged void order of sale, brought after the limitation prescribed by this section, within which an

Executors and Administrators \S 380 (2).
 34 C.J.S. Executors and Administrators
 $\S\S$ 614, 617, 624.

91-3037. (10246) To what cases preceding section not to apply. The preceding section shall not apply to minors or others under any legal disability to sue at the time when the right of action first accrues; but all such persons may commence an action at any time within three years after removal of the disability.

History: En. Sec. 222, p. 300, L. 1877; re-en. Sec. 222, 2nd Div. Rev. Stat. 1879; re-en. Sec. 222, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2706, C. Civ. Proc. 1895; re-en. Sec. 7597, Rev. C. 1907; re-en. Sec. 10246, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1574.

order of sale, brought after the limitation prescribed by the preceding section, within which an heir must commence his action had expired, but within the three-year period after reaching his majority (this section), was not barred. Lamont v. Vinger, 61 M 530, 536 et seq., 202 P 769.

Operation and Effect

An action to recover real property sold by an administrator under an alleged void

References

Montgomery v. Gilbert, 77 F 2d 39.

91-3038. (10247) Account of sale to be returned. When a sale has been made by an executor or administrator of any property of the estate, real or personal, he must return to the court or judge, within thirty days thereafter, an account of sales, verified by his affidavit. If he neglects to make such return, he may be punished by attachment, or his letters may be revoked, one day's notice having been first given him to appear and

show cause why such attachment should not issue, or such revocation should not be made.

History: En. Sec. 223, p. 300, L. 1877; re-en. Sec. 223, 2nd Div. Rev. Stat. 1879; re-en. Sec. 223, 2nd Div. Comp. Stat. 1887; amd. Sec. 2707, C. Civ. Proc. 1895; re-en. Sec. 7598, Rev. C. 1907; re-en. Sec. 10247, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1575.

References

In re Rinio's Estate, 93 M 428, 432, 19 P 2d 322.

Executors and Administrators—374.

34 C.J.S. Executors and Administrators § 606.

91-3039. (10248) Executor, etc., not to be purchaser. No executor or administrator must, either directly or indirectly, purchase any property of the estate he represents, nor must he be interested in any sale.

History: En. Sec. 224, p. 300, L. 1877; re-en. Sec. 224, 2nd Div. Rev. Stat. 1879; re-en. Sec. 224, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2708, C. Civ. Proc. 1895; re-en. Sec. 7599, Rev. C. 1907; re-en. Sec. 10248, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1576.

Executors and Administrators—115, 144, 163, 365.

33 C.J.S. Executors and Administrators §§ 239-241, 288; 34 C.J.S. Executors and Administrators § 599.

21 Am. Jur. 730, Executors and Administrators, §§ 622 et seq.

CHAPTER 31

MORTGAGING AND LEASING REAL ESTATE

- Section 91-3101. Judge may empower administrator, executor or guardian to mortgage, option, lease or sell real estate.
- 91-3102. Manner of obtaining authority to mortgage—petition, contents and filing.
- 91-3103. Order to show cause.
- 91-3104. Service and publication of order.
- 91-3105. Hearing on application to mortgage—order of court directing loan.
- 91-3106. Execution and delivery of promissory notes and mortgages—recording of copy of order.
- 91-3107. Effect of mortgage—jurisdiction of court—irregularity not to invalidate—deficiency judgment.
- 91-3108. Leasing—procedure to procure order—provisions and terms—execution—effect.
- 91-3109. Manner of obtaining authority for sale of or for option to purchase mining property.

91-3101. (10249) Judge may empower administrator, executor or guardian to mortgage, option, lease or sell real estate. Whenever, in any estate now being administered, or that may hereafter be administered, or in any guardianship proceeding now pending, or that may hereafter be pending, it shall appear to the district court, or to a judge thereof, to be for the advantage of the estate to raise money upon a note or notes, to be secured by a mortgage of the real property of any decedent, or of a minor, or of an incompetent person, or any part thereof, or to make a lease of said real property, or any part thereof, or to agree to sell or give an option to purchase a mining claim, or mining claims, or real property worked as a mine, or an undivided interest in real property, the court or judge, as often as occasion therefor shall arise in the administration of any estate or in the course of any guardianship matter, may, on a petition, notice, and hearing as provided in this chapter, authorize, empower and direct the executor or administrator, or guardian of such minor or incompetent person, to mortgage such real property, or any part thereof, and to execute a note or notes to be secured by such mortgage, or to lease

such real estate, or any part thereof, or to enter into an agreement to sell such real estate, or any part thereof, or to give an option to purchase such real property or any part thereof. The proceedings to be taken to obtain an order to enter into an agreement for the sale of or for an option to purchase a mining claim or claims or real property worked as a mine, and the effect thereof, shall be as provided in section 91-3109, and the provisions of said section in so far as applicable shall also govern the proceedings to be taken to obtain an order to enter into an agreement for the sale of or for an option to purchase an undivided interest in real property and the effect thereof.

History: En. Sec. 2720, C. Civ. Proc. 1895; re-en. Sec. 7600, Rev. C. 1907; amd. Sec. 1, Ch. 187, L. 1919; amd. Sec. 1, Ch. 18, L. 1921; re-en. Sec. 10249, R. C. M. 1921; amd. Sec. 1, Ch. 170, L. 1941. Cal. C. Civ. Proc. Sec. 1577.

Court Cannot Abrogate a Lease Regular in All Respects for a More Favorable One

The district court has no power, against the objection of the person designated in an order as the lessee, to revoke an order directing the executor to lease land to such person at a fixed rental, where he has accepted and complied with the conditions of the order, though the executor has subsequently had a more favorable offer. State ex rel. Shields v. District Court, 24 M 1, 12, 60 P 489.

Lease Must be Made According to the Terms of the Court Order

After the district court has made an order directing an executor to make a particular lease specified in the order, no discretion is left to the executor; the duty is obligatory upon him to carry out the order according to its terms. State ex rel. Shields v. District Court, 24 M 1, 10, 60 P 489.

Lease or Mortgage to Pay Debts

When necessary to pay the debts of an estate it is the duty of the administrator to take the requisite steps for that purpose under either of the three methods provided by secs. 91-2801, 91-2802, 91-3001, or this section. Swanberg v. National Surety Co., 86 M 340, 356, 283 P 761.

Parties to Lease Must be Before Court

Upon an application for leave to exe-

cute a lease to a certain person, the district court cannot grant a lease to other parties who are not before it. State ex rel. Shields v. District Court, 24 M 1, 12, 60 P 489.

Id. The district court cannot, of its own motion, without any application, notice, or hearing, grant a lease to any person making it known that a lease is desired.

Power of Court to Modify Terms of Lease

The district court has power to modify an order, previously made, as to the amount of rental, where the executor and the lessees have agreed to the modification. State ex rel. Shields v. District Court, 24 M 1, 11, 60 P 489.

Power to Lease

The district court has authority to enter an order directing an executor to make a lease of his decedent's lands for the term and rental and to the parties specified in the order. State ex rel. Shields v. District Court, 24 M 1, 9, 60 P 489.

References

Lamont v. Vinger, 61 M 530, 542, 202 P 769.

Executors and Administrators—398, 399. 33 C.J.S. Executors and Administrators § 297; 34 C.J.S. Executors and Administrators § 654.

21 Am. Jur. 509, Executors and Administrators, §§ 241-243.

Character of claims or obligations contemplated by statute expressly empowering executors, administrators, or guardians to borrow money. 85 ALR 215.

91-3102. (10250) Manner of obtaining authority to mortgage—petition, contents and filing. To obtain an order to mortgage such realty, the proceedings to be taken and the effect thereof must be as follows:

The executor, administrator, or any person interested in the estate may file a verified petition showing: The particular purpose or purposes for which it is proposed to make the mortgage, which shall be either to pay the debts, legacies, or charges of administration, or to pay, reduce,

extend, or renew some lien or mortgage already subsisting on said realty, or some part thereof; a statement of the debts, legacies, charges of administration, liens, or mortgages to be paid, reduced, extended, or renewed, as the case may be; the advantage that may accrue to the estate from raising the required money by mortgage, or providing for the payment, reduction, extension, or renewal of the subsisting liens, or mortgages, as the case may be; the amount to be raised, with a general description of the property proposed to be mortgaged; and the names of the legatees and devisees, if any, and of the heirs of the deceased, so far as known to the petitioner.

History: En. Sec. 2721, C. Civ. Proc. 1895; re-en. Sec. 7601, Rev. C. 1907; re-en. Sec. 10250, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1578.

Executors and Administrators 332 et seq., 398.

34 C.J.S. Executors and Administrators §§ 556 et seq., 654 et seq.

References

Lamont v. Vinger, 61 M 530, 542, 202 P 769.

91-3103. (10251) Order to show cause. Upon filing such petition an order must be made by the court or judge, requiring all persons interested in the estate to appear before the court or judge, at a time and place specified, not less than fifteen (15) nor more than thirty (30) days thereafter, then and there to show cause why the realty (briefly indicating it), or some part thereof, should not be mortgaged for the amount mentioned in the petition (stating such amount), or such lesser amount as to the court or judge shall seem meet, and referring to the petition on file for further particulars.

History: En. Sec. 2721, C. Civ. Proc. 1895; re-en. Sec. 7601, Rev. C. 1907; re-en. Sec. 10251, R. C. M. 1921; amd. Sec. 1, Ch. 70, L. 1927. Cal. C. Civ. Proc. Sec. 1578.

91-3104. (10252) Service and publication of order. The order to show cause may be personally served on the persons interested in the estate, at least ten (10) days before the time appointed for hearing the petition, or it may be published once a week for two (2) successive weeks in such newspaper published in the county, as the court or judge shall direct. If all persons interested in the estate join in the petition or signify in writing their assent thereto, the notice may be dispensed with, and the hearing may be had at any time; provided, further, that if such petition is for the purpose of extending or renewing any mortgage already subsisting on said realty, or on some part thereof, and the court finds such extension or renewal necessary or to the best interest of the estate, the court may make an order authorizing the extension or renewal of such mortgage without notice.

History: En. Sec. 2721, C. Civ. Proc. 1895; re-en. Sec. 7601, Rev. C. 1907; re-en. Sec. 10252, R. C. M. 1921; amd. Sec. 2, Ch. 70, L. 1927. Cal. C. Civ. Proc. Sec. 1578.

91-3105. (10253) Hearing on application to mortgage—order of court directing loan. At the time and place appointed in the order to show cause, or at such other time and place to which the hearing may be postponed (the power to make all needful postponements being hereby vested in the court

or judge), having first received satisfactory proof of personal service or publication of the order to show cause, the court or judge must proceed to hear the petition and any objections that may be filed or presented thereto. Upon such hearing, witnesses may be compelled to appear and testify, in the manner, and with like effect, as in other cases; and if, after a full hearing, the court or judge is satisfied that it will be for the advantage of the estate to mortgage the whole, or any portion, of the real estate, an order must be made authorizing, empowering, and directing the executor or administrator, or the guardian of such minor or incompetent person, to make such mortgage, and a promissory note or notes to the lender, for the amount of the loan to be secured by said mortgage; the order may direct that a lesser amount than that named in the petition be borrowed, and may prescribe the maximum rate of interest, and the period of the loan, and require that the interest, and the whole or any part of the principal be paid, from time to time, out of the whole estate, or any part thereof, and that any buildings on the premises to be mortgaged shall be insured for further security of the lender, and the premiums paid from any moneys in the estate.

History: En. Sec. 2721, C. Civ. Proc. 1895; re-en. Sec. 7601, Rev. C. 1907; amd. Sec. 2, Ch. 187, L. 1919; re-en. Sec. 10253, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1578.

Judge's Duty to Protect Heirs Although no Objection Presented—Disqualified Where Interested

In an action to set aside a mortgage, and the order purporting to authorize administratrix to execute the same, wherein it was contended that the judge was a

stockholder, director and vice-president of the mortgagee bank, held, that the order was void excepting as against enforcement by bank and against heirs not joining in the petition, because the judge was disqualified by reason of his interest in action, and in making the order was required to determine the amount borrowed, property to be mortgaged under this section, and to protect the heirs even in the absence of objections. *Gaer v. Bank of Baker*, 111 M 204, 208, 107 P 2d 877.

91-3106. (10254) Execution and delivery of promissory notes and mortgages—recording of copy of order. After the making of the order to mortgage, the executor or administrator, or the guardian of a minor or incompetent person, shall execute and deliver a promissory note or notes for the amount and period specified in the order, and shall execute, acknowledge, and deliver a mortgage of the premises, setting forth in the mortgage that it is made by authority of the order, and giving the date of such order. A certified copy of the order shall be recorded in the office of the county recorder of every county in which the encumbered land, or any part thereof, lies. The note or notes and the mortgage shall be signed by the executor, administrator, or guardian as such, and shall create no personal liability against the person or persons so signing.

History: En. Sec. 2721, C. Civ. Proc. 1895; re-en. Sec. 7601, Rev. C. 1907; amd. Sec. 3, Ch. 187, L. 1919; re-en. Sec. 10254, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1578.

91-3107. (10255) Effect of mortgage—jurisdiction of court—irregularity not to invalidate — deficiency judgment. Every mortgage so made shall be effectual to mortgage and hypothecate all the right, title, interest, and estate which the decedent had in the premises described therein, at the time of his death, and any right, title, or interest in said premises, acquired by his estate, by operation of law, or otherwise, since the time of his death. Jurisdiction of the court to administer the decedent's estate

shall be effectual to vest such court and judge with jurisdiction to make the order for the mortgage, and such jurisdiction shall conclusively inure to the benefit of the mortgagee named in the mortgage, his heirs and assigns. No irregularity in the proceedings shall impair or invalidate the same, or the mortgage given in pursuance thereof; and the mortgagee, his heirs and assigns, shall have and possess the same rights and remedies on the mortgage, as if it had been made by the decedent prior to his death. Upon any foreclosure, if the proceeds of the encumbered property are insufficient to pay the mortgage, no judgment or claim for any deficiency of such proceeds, to satisfy the mortgage, or the costs or expenses of sale, shall be had or allowed, except in cases where the mortgage was given to pay, reduce, extend, or renew a lien or mortgage subsisting on the realty, or some part thereof, at the time of the death of the decedent, and the indebtedness secured by such lien or mortgage was an allowed and approved claim against his estate. The part of the indebtedness remaining unsatisfied must be classed and paid with other demands against the estate, as provided in sections 91-3601 to 91-3611, with respect to mortgages subsisting at the time of death.

History: En. Sec. 2721, C. Civ. Proc. Sec. 10255, R. C. M. 1921. Cal. C. Civ. 1895; re-en. Sec. 7601, Rev. C. 1907; re-en. Proc. Sec. 1578.

91-3108. (10256) Leasing—procedure to procure order—provisions and terms—execution—effect. To obtain an order to lease the realty, the proceedings to be taken and the effect thereof shall be as follows:

1. The executor, administrator, or any person interested in the estate, may file a verified petition showing: The advantage or advantages that may accrue to the estate from giving a lease; a general description of the property proposed to be leased; the term, rental, and general conditions of the proposed lease; and the names of the legatees and devisees, if any, and of the heirs of the deceased, so far as known to the petitioner.

2. Upon filing such petition an order must be made by the court or judge, requiring all persons interested in the estate to appear before the court or judge, at a time and place specified, not less than two nor more than four weeks thereafter, then and there to show cause why the realty (briefly indicating it) should not be leased for the period (stating it), at the rental mentioned in the petition (stating it), and referring to the petition on file for further particulars.

3. The order to show cause must be personally served on the persons residing in the county interested in the estate, at least ten days before the time appointed for hearing the petition, or be published for two successive weeks in a newspaper of general circulation published in the county.

4. At the time and place appointed in the order to show cause, or such other time and place to which the hearing may be postponed, the court or judge having first received satisfactory proof of personal service or publication of the order to show cause, must proceed to hear the petition, and any objections that may be filed or presented thereto. Upon such hearing, witnesses may be compelled to attend and testify in the same manner and with like effect as in other cases, and the court or judge may, in its or his discretion, appoint one or more, not exceeding three, disinterested persons to appraise the rental value of the premises, and

direct that a reasonable compensation for their services, not to exceed five dollars per day, be paid by the estate. If, after a full hearing, the court or judge is satisfied that it will be for the advantage of the estate to lease the whole or any portion of the real estate, an order must be made authorizing, empowering, and directing the executor or administrator to make such lease. The order may prescribe the minimum rental to be received for the premises, and the period of the lease, which must in no case be longer than for five years, except that a lease or contract providing for the exploration of the premises for oil, gas or hydrocarbons may provide for a term of five years or for as long thereafter as oil, gas or hydrocarbons shall be produced in commercial quantities, and may prescribe the other terms and conditions of such lease.

5. After the making of the order to lease, the executor or administrator must execute, acknowledge, and deliver a lease of the premises, for the rent, and period, and with the conditions specified in the order, such lease before it shall become effective shall be approved by the court or judge thereof before delivery, setting forth in the lease that it is made by authority of the order, and giving the date of such order. A certified copy of the order shall be recorded in the office of the county clerk of every county in which the leased land, or any portion thereof, lies.

6. Every lease so made shall be effectual to demise and let, at the rent, for the term, and upon the conditions prescribed therein, the premises described therein. Jurisdiction of the court to administer the decedent's estate shall be effectual to vest such court and judge with jurisdiction to make the order for the lease, and such jurisdiction shall conclusively inure to the benefit of the lessee, his heirs and assigns. No omission, error, or irregularity in the proceedings impairs or invalidates the same, or the lease made in pursuance thereof.

History: En. Sec. 2722, C. Civ. Proc. 1895; re-en. Sec. 7602, Rev. C. 1907; re-en. Sec. 10256, R. C. M. 1921; amd. Sec. 1, Ch. 113, L. 1923. Cal. C. Civ. Proc. Sec. 1579.

and notice to all parties interested, and an order made without such formalities is void. State ex rel. Shields v. District Court, 24 M 1, 13, 60 P 489.

Operation and Effect

The error, omission, or irregularity, referred to in subdivision 6 of this section, does not warrant dispensing with a verified petition by some authorized person,

Executors and Administrators—339 et seq., 399.

33 C.J.S. Executors and Administrators § 297; 34 C.J.S. Executors and Administrators §§ 568, 569, 573 et seq.

91-3109. (10256.1) Manner of obtaining authority for sale of or for option to purchase mining property. To obtain an order to enter into an agreement for the sale of, or for an option to purchase, a mining claim or claims, or real property worked as a mine, the proceedings to be taken and the effect thereof shall be as follows:

1. The executor, administrator, or guardian of a minor or of an incompetent person, or any person interested in the estate of such decedents, minors, or incompetent persons, may file a verified petition showing: The advantage or advantages that may accrue to the estate from entering into such agreement or option; a general description of the property to be affected by the proposed agreement or option; the terms and general conditions of the proposed agreement or option; and the names of the legatees

and devisees, if any, and of the heirs of the deceased, or of the minor or of the incompetent person, so far as known to the petitioner.

2. Upon filing such petition an order shall be made by the court or judge requiring all persons interested in the estate to appear before the court or judge at a time and place specified, not less than two (2) or more than four (4) weeks thereafter, then and there to show cause why an agreement for the sale, or an option for the purchase of the realty should not be made, and referring to the petition on file for further particulars.

3. The order to show cause must be personally served on the persons interested in the said estate, who are residing in the county, at least ten (10) days before the time appointed for hearing the petition, or be published once a week for two (2) consecutive weeks in a newspaper of general circulation published in the county, and if there is none, then in some newspaper of general circulation in an adjoining county.

4. At the time and place appointed to show cause, or at such other time and place to which the hearing may be postponed, the court or judge having first received satisfactory proof of personal service or publication of the order to show cause, must proceed to hear the petition, and any objections that may have been filed or presented thereto. If, after a full hearing, the court or judge is satisfied that it will be for the advantage or best interest of the estate to enter into the proposed agreement for the sale, or option for the purchase, of the mines or real property worked as a mine, an order must be made authorizing, empowering and directing the executor, administrator or guardian to make such agreement or option to purchase. The order may prescribe the terms and conditions of such agreement or option to purchase. The court or judge may, at the time of making said order authorizing such agreement to sell or option to purchase, fix the amount of bond to be given by the executor, administrator or guardian, and may provide for the payment into court of the proceeds from said agreement to sell or option to purchase, and that the said executor, administrator, or guardian shall give the bond required before obtaining an order of the court for the payment to him of such proceeds from said agreement to sell or option to purchase.

5. After the making of the order to enter into said agreement or option to purchase, the executor, administrator or guardian shall execute, acknowledge and deliver an agreement or option to purchase containing the conditions specified in the order, setting forth in the agreement or option to purchase that it is made by authority of the order, and giving the date of such order. A certified copy of such order shall be recorded in the office of the county recorder of every county in which the land affected by the agreement or option to purchase, or any portion thereof, is situated. If the party of the second part to said agreement to sell or option to purchase neglects or refuses to comply with the terms of the agreement to sell or option to purchase, the court may, on motion of the executor, administrator or guardian, and after notice to the said party of the second part, order such agreement to sell or option to purchase canceled.

6. The executor, administrator or guardian, after the terms of said agreement to sell, or said option to purchase, have been complied with by the party of the second part thereto, and all payments mentioned in the

same have been made according to the terms of said agreement to sell or option to purchase, must make a return of his proceedings to the court, which must be filed in the office of the clerk at any time subsequent to the compliance with said conditions and the making of said payments. A hearing upon the return of the proceedings may be asked for in the return or by petition subsequently, and thereupon the clerk must fix the day of the hearing, of which notice of at least ten (10) days must be given by the clerk, by notices posted in three (3) public places in the county, or by publication in a newspaper, and must briefly indicate the land or lands mentioned in the agreement to sell or option to purchase and must refer to the return for further particulars. Upon the hearing, the court must examine the return and witnesses in relation to the same.

If it appears to the court that the terms of the said agreement to sell or option to purchase, including all payments to be made, have been complied with, the court must make an order confirming the sale, and directing the conveyances to be executed. The sale, from that time, is confirmed and valid, and a certified copy of the order confirming it and directing conveyances to be executed, must be recorded in the office of the recorder of every county in which the land sold, or any part thereof, is situated.

Conveyances must thereupon be executed to the purchaser by the executor, administrator or guardian, and they must refer to the orders of the court authorizing and confirming the sale of the property of the estate, and directing conveyances thereof to be executed and to the record of the order of confirmation in the office of the county recorder, either by the date of such recording, or by the date, volume, and page of the record, and such reference shall have the same effect as if the orders were at large inserted in the conveyance. Conveyances so made convey all the right, title, interest, and estate of the decedent, in the premises, at the time of his death; if prior to the sale, by operation of law or otherwise, the estate has acquired any right, title or interest in the premises, other than or in addition to that of the decedent at the time of his death, such right, title or interest also passes by such conveyances.

History: En. Sec. 2, Ch. 170, L. 1941.

CHAPTER 32

GENERAL POWERS AND DUTIES OF EXECUTORS AND ADMINISTRATORS

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| Section | 91-3201. Executors or administrators to take possession of the entire estate. |
| | 91-3202. Executors and administrators may sue and be sued. |
| | 91-3203. May maintain actions for waste, conversion and trespass. |
| | 91-3204. Executor and administrator may be sued for waste, trespass or conversion of decedent. |
| | 91-3205. Surviving partner to settle up business—interest therein to be appraised—account to be rendered. |
| | 91-3206. Actions on bond of executor or administrator may be brought by another administrator. |
| | 91-3207. What executors are not parties to actions. |
| | 91-3208. May compound. |
| | 91-3209. Recovery of property fraudulently disposed of by testator. |
| | 91-3210. When executor or administrator to sue, as provided in preceding section. |

91-3211. Disposition of estate recovered.

91-3212. Chattel mortgages, power of representative or guardian to make.

91-3201. (10257) Executors or administrators to take possession of the entire estate. The executor or administrator must take into his possession all the estate of the decedent, real and personal, and collect all debts due to the decedent or to the estate. For the purpose of bringing suits to quiet title, or for partition of such estate, the possession of the executors or administrators is the possession of the heirs or devisees; such possession by the heirs or devisees is subject, however, to the possession of the executor or administrator, for the purposes of administration, as provided in this Title.

History: En. Sec. 225, p. 300, L. 1877; re-en. Sec. 225, 2nd Div. Rev. Stat. 1879; re-en. Sec. 225, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2730, C. Civ. Proc. 1895; re-en. Sec. 7603, Rev. C. 1907; re-en. Sec. 10257, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1581.

Cross-Reference

Apprentices, authority to bind children, sec. 10-303.

Operation and Effect

An administrator has a right to the possession of the real estate of the decedent of whose estate he is administrator, and may bring ejectment in his own name as administrator, for the possession of the same, against a trespasser. *Black v. Story*, 7 M 238, 242, 14 P 703. See also *In re Higgins' Estate*, 15 M 474, 485, 39 P 506; *Kohn v. McKinnon*, 90 F 623, 626.

Where a defaulting vendee of farm lands in consideration of being permitted to remain in possession agreed in writing to give the vendor a promissory note secured by a crop mortgage for moneys due, an equitable lien was created though neither note nor mortgage were even given, which lien the administrator of the estate of the vendor, knowing of its existence, was in duty bound to collect, if

possible, and for his failure to attempt to collect he was chargeable in his account for the resulting loss. *Scott et al. v. Tuggle*, 74 M 476, 484, 241 P 229.

Id. An administrator may not excuse his failure to collect a debt due to the estate of his decedent by reliance upon the advice of an attorney that an attempt to collect would result in litigation and delay in settlement of the estate.

References

Cited or applied as sec. 7603, Revised Codes, in *Tyler v. Tyler*, 50 M 65, 72, 144 P 1090; *In re Dolenty's Estate*, 53 M 33, 39, 161 P 524; *Maygar v. St. Louis Min. etc. Co.*, 68 M 492, 500, 219 P 1102; *In re Bradfield's Estate*, 69 M 247, 260, 221 P 531; *In re Jennings' Estate*, 74 M 449, 455, 241 P 648; *Swanberg v. National Surety Co.*, 86 M 340, 353, 283 P 761.

Executors and Administrators—86, 130, 154 et seq.; Partition—19 et seq.; Quieting Title—12.

33 C.J.S. Executors and Administrators §§ 168 et seq., 257, 300; 47 C.J. Partition § 107 et seq.; 51 C.J. Quieting Title § 98 et seq.

21 Am. Jur. 485, Executors and Administrators, § 205 et seq.

91-3202. (10258) Executors and administrators may sue and be sued. Actions for the recovery of any property, real or personal, or for the possession thereof, and all actions founded upon contracts, may be maintained by or against executors and administrators, in all cases in which the same might have been maintained by or against their respective testators or intestates.

History: En. Sec. 226, p. 300, L. 1877; re-en. Sec. 226, 2nd Div. Rev. Stat. 1879; re-en. Sec. 226, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2731, C. Civ. Proc. 1895; re-en. Sec. 7604, Rev. C. 1907; re-en. Sec. 10258, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1582.

Operation and Effect

The right given to an administrator by this section, to maintain an action for the recovery of real property of his intestate

(if applicable to an action to recover property sold by him under an order of sale) is not exclusive, under 91-2210 conferring the same right upon the heirs. *Lamont v. Vinger*, 61 M 530, 537, 202 P 769.

An executor cannot be forced to bring suit to recover possession of property claimed to be part of the estate unless necessity therefor for administrative purposes exists; hence where devisees petitioned for the removal of executors for

failing to inventory a parcel of realty claimed by the devisees to be part of the estate and have others appointed in their place who would take action, and the record did not show that there were debts or claims unpaid or that the possession of the property was necessary to a proper discharge of the duty of the executors in administering the estate, the court properly refused to order their removal. *In re Estate of Deschamps*, 65 M 207, 215, 212 P 512.

References

Bielenberg v. Higgins et al., 85 M 56, 68, 277 P 631; *Swanberg v. National Surety Co.*, 86 M 340, 353, 283 P 761; *Langston et al. v. Currie et al.*, 95 M 57, 72, 26 P 2d 160; *Murch v. Fellows*, — M —, 167 P 2d 842, 843.

Executors and Administrators ¶420.

34 C.J.S. *Executors and Administrators* § 688.

21 Am. Jur. 495, *Executors and Administrators* §§ 222, 223.

91-3203. (10259) May maintain actions for waste, conversion and trespass. Executors and administrators may maintain actions against any person who has wasted, destroyed, taken, or carried away, or converted to his own use, the goods of their testator or intestate, in his lifetime. They may also maintain actions for trespass committed on or damage to the real estate of the decedent in his lifetime.

History: En. Sec. 227, p. 300, L. 1877; re-en. Sec. 227, 2nd Div. Rev. Stat. 1879; re-en. Sec. 227, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2732, C. Civ. Proc. 1895; re-en. Sec. 7605, Rev. C. 1907; re-en. Sec. 10259, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1583.

References

Swanberg v. National Surety Co., 86 M 340, 356, 283 P 761.

Executors and Administrators ¶426.

33 C.J.S. *Executors and Administrators* §§ 123, 124, 253-258, 267, 300; 34 C.J.S. *Executors and Administrators* § 692.

21 Am. Jur. 495, *Executors and Administrators*, §§ 222-224.

91-3204. (10260) Executor and administrator may be sued for waste, trespass or conversion of decedent. Any person or his personal representative may maintain an action against the executor or administrator of any testator or intestate who, in his lifetime, has wasted, destroyed, taken, or carried away, or converted to his own use, the goods or chattels of any such person, or committed any trespass on the real estate of such person.

History: En. Sec. 228, p. 301, L. 1877; re-en. Sec. 228, 2nd Div. Rev. Stat. 1879; re-en. Sec. 228, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2733, C. Civ. Proc. 1895; re-en. Sec. 7606, Rev. C. 1907; re-en. Sec. 10260, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1584.

Operation and Effect

A cause of action for damages for wrongfully procuring the appointment of a receiver survives against the executor of a decedent wrongdoer. *Thornton-Thomas Co. v. Bretherton*, 32 M 80, 89, 80 P 10.

91-3205. (10261) Surviving partner to settle up business—interest therein to be appraised—account to be rendered. When a partnership exists between the decedent, at the time of his death, and any other person, the surviving partner has the right to continue in possession of the partnership, and to settle its business, but the interest of the decedent in the partnership must be included in the inventory, and be appraised as other property. The surviving partner must give a bond, with sufficient sureties, in favor of the executor or administrator, in a sum at least equal to the value of the interest of the deceased partner in the property of the partnership. The amount of said bond must be fixed and the bond approved by the judge. In case he fails to give such bond, the court or judge may compel its execution by attachment or other proper order. The surviving partner must settle the affairs of the partnership without delay, and account with

the executor or administrator, and pay over such balances as may from time to time be payable to him, in right of the decedent. Upon the application of the executor or administrator, the court or judge may, whenever it appears necessary, order the surviving partner to render an account, and in case of neglect or refusal may, after notice, compel it by attachment; and the executor or administrator may maintain against him any action which the decedent could have maintained. The surviving partner is a trustee of the estate or interest of the deceased partner in the property of the partnership, for every purpose, and the court or judge may require the surviving partner to account at any time.

History: En. Sec. 229, p. 301, L. 1877; re-en. Sec. 229, 2nd Div. Rev. Stat. 1879; re-en. Sec. 229, 2nd Div. Comp. Stat. 1887; amd. Sec. 1, p. 146, L. 1889; amd. Sec. 2734, C. Civ. Proc. 1895; re-en. Sec. 7607, Rev. C. 1907; re-en. Sec. 10261, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1585.

Action Against Partner for Accounting—Circumstances Under Which Defenses of Statute of Limitations or Laches Not Available

One of two copartners in the livestock business died in 1903. By his will he reserved to his wife a life estate in all his property. The remaindermen and the widow agreed that the business should be continued as theretofore, thus creating a new partnership between the surviving partner and the widow. The executor acted until his death in 1918; no successor was appointed. The widow died in 1929. The district court dismissed an action thereafter brought to secure an accounting from the surviving partner in connection with the affairs of the original partnership, on the ground that it was barred under the statute of limitations as well as on the theory of laches. Held, that under the agreement to continue the business as it had been run prior to the death of the original partner, the estate remained dormant until the death of the life tenant, the widow; that in the interim no cause of action could arise calling for action on the part of the remaindermen, and that therefore the finding that the action was barred was error. *Thompson et al. v. Flynn*, 95 M 484, 496, 27 P 2d 505.

Administrator May Maintain an Action Against Surviving Partner

An administrator may maintain against a surviving partner any action which the deceased could have maintained. In the matter of relief—aside from the remedy furnished through the probate court—the personal representative of the decedent occupies the same relative position, with reference to the surviving partners, that the deceased, if alive, would sustain to his copartners. *Boehme v. Fitzgerald*, 43 M 226, 227, 115 P 413.

Duty of Partner to Account to the Estate

Where death dissolves a general trading partnership, the surviving partners are entitled to continue in possession and to settle the partnership affairs. It is their duty to account to the deceased partner's estate, and, upon failure to do so, they may be compelled by summary proceedings. *Boehme v. Fitzgerald*, 43 M 226, 227, 115 P 413.

A surviving partner may be required to make known the amount of partnership debts and the amount of firm assets in his possession, to the end that the court may determine whether the possession of firm property held by the estate of the deceased partner is necessary in order that the surviving partner may discharge the duties imposed upon him by this section. *Silver v. Eakins*, 55 M 210, 216, 175 P 876.

Where the affairs of a general partnership dissolved by death were not fully settled, an action for an accounting by the surviving partner for his sole benefit, against the executrix of the decedent did not lie, in view of the provisions of the section, which inter alia make it the duty of the survivor who, in contemplation of law, is in actual possession of the partnership property, to wind up its affairs, and thereupon account to the personal representative of the decedent. *Mares v. Mares et al.*, 60 M 36, 45 et seq., 199 P 267.

Effect of Failure to Give Bond

The failure of a surviving partner to give the bond required by this section did not affect his right to the possession of the firm property, or defeat his right to maintain any appropriate action concerning it; the bond is required merely to protect the interest of the deceased partner. *Silver v. Eakins*, 55 M 210, 217, 175 P 876.

Failure of Surviving Partner to Account to Representative of Estate—Representative, Not Heirs, Must Sue for Accounting

Where a surviving partner fails to render an account to the personal representative of the deceased partner on settlement of the partnership business, the rep-

representative, and not the heirs, must sue for an accounting, it, however, being incumbent upon those interested in the estate to see that the representative performs his duty in that regard. *Thompson et al. v. Flynn*, 95 M 484, 494, 27 P 2d 505.

Not Applicable to Mining Partnerships

The rule declared by this section, that in case of death of one member of a partnership the surviving partner has the right to the possession of all of the partnership property and to settle its business, and that the partnership assets form no part of the individual estate of the deceased partner until the partnership affairs have been wound up by the survivor applies to general trading partnerships only, not to mining partnerships. *Bielenberg v. Higgins et al.*, 85 M 56, 65, 277 P 631.

Power of Surviving Partner in General

A surviving partner has the right to continue in possession of the partnership property, and to settle the partnership business. The authority to settle up the business contemplates the completion of transactions begun before the death of the one partner. The surviving partner not only has the authority, but it is his duty, to expend the partnership means in protecting partnership property. *Weiss v. Hamilton*, 40 M 99, 108, 105 P 74.

While the death of one of two partners dissolves the partnership, it does not affect the partnership property, except to give the surviving partner exclusive control of the property, for the purpose of settling up the partnership business. *First National Bank v. Silver*, 45 M 231, 236, 122 P 584.

The death of a partner dissolves the partnership, under sec. 8009, since repealed, and the surviving partner at once becomes entitled to the possession of sufficient firm property to enable him to discharge the duties imposed by this section. *Silver v. Eakins*, 55 M 210, 216, 175 P 876.

Right of Survivor to Bring Action for Accounting Not Abrogated by This Section

This section, relating to the duties of a surviving partner in winding up the affairs of the partnership, does not by implication abrogate the right of the survivor to bring a suit in equity for an accounting against the personal representative of the decedent, in a proper case; if such was the intention the section would be unconstitutional, since district courts may not by legislative action be deprived of jurisdiction in all equity cases granted them by sec. 11, Article VIII of the state Constitution. *Link v. Haire*, 82 M 406, 420, 426, 267 P 952.

Sufficiency of Complaint in Action by Surviving Partner Against Estate

A complaint in an action by a surviving partner to recover partnership property from the estate of the deceased partner was insufficient, under this section, for failure to disclose the amount of the firm's debts, if any, or the amount or value of its assets in plaintiff's possession. *Silver v. Eakins*, 55 M 210, 215, 175 P 876.

A surviving partner is not required to join the heirs of his deceased partner as parties plaintiff in his action to recover on promissory notes held by the partnership; he alone has the right to collect claims due the partnership, unaffected by the fact that he made accounting to the administratrix of the estate of the decedent, the purpose of which was merely to show the condition of the partnership affairs, or by the entry of decree of final distribution of the decedent's estate. *White v. Pahl*, 94 M 345, 348, 22 P 2d 315.

When Partnership Property Becomes Part of the Estate

Until the affairs of a partnership are settled and the share of one of the partners who has died is paid over to his personal representative, partnership property is in no sense property of the decedent's estate to be administered as a part of the estate. *White v. Pahl*, 94 M 345, 348, 22 P 2d 315.

Where Partnership Property in Possession of Administrator

Where the administrator, under probate court order and guidance, had contrary to this section taken over and assumed to administer the partnership property together with plaintiff's alleged bank account, plaintiff instituted an action to establish a partnership between himself and deceased in the livestock and ranching business, and by reason thereof his right to one-half of all the assets of such business in the administrator's possession, for also his bank account, and funds he had advanced for administration purposes, all of which was awarded in a money judgment. Plaintiff held not expected to account for defendant's management of partnership property. *Gaspar v. Buckingham*, 116 M 236, 248, 153 P 2d 892.

Id. Where plaintiff in the above action took possession of all property and business in question, upon the death of the brother, and retained it until the court ordered that it be turned over to the administrator appointed, plaintiff's failure to retain possession did not estop him from claiming a right of possession for the purposes of his action to establish a partnership between him and decedent.

Id. Held, complaint not defective for failing to allege that plaintiff had made an accounting or that the claim had been presented to the administrator, where the action involved a transaction by defendant administrator who had taken over the partnership property by court order contrary to this section together with plaintiff's personal bank account, since the case involved, not the partnership operation prior to death, nor money claimed due from him at his death to which the claim statute 91-2704 refers, but transactions

after his death by his administrator not within the claim statute.

References

Thompson v. Flynn, 102 M 446, 449, 450, 58 P 2d 769; Federal Land Bank of Spokane v. Green, 108 M 56, 59, 90 P 2d 489.

Partnership ⇨ 243-258.

47 C.J. Partnership §§ 613, 658.

21 Am. Jur. 470, Executors and Administrators, § 174.

91-3206. (10262) Actions on bond of executor or administrator may be brought by another administrator. An administrator may, in his own name, for the use and benefit of all parties interested in the estate, maintain actions on the bond of an executor, or of any former administrator of the same estate.

History: En. Sec. 230, p. 301, L. 1877; re-en. Sec. 230, 2nd Div. Rev. Stat. 1879; re-en. Sec. 230, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2735, C. Civ. Proc. 1895; re-en. Sec. 7608, Rev. C. 1907; re-en. Sec. 10262, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1586.

Executors and Administrators ⇨ 537 (6).

34 C.J.S. Executors and Administrators § 967.

91-3207. (10263) What executors are not parties to actions. In actions by or against executors, it is not necessary to join those as parties to whom letters were issued, but who have not qualified.

History: En. Sec. 231, p. 301, L. 1877; re-en. Sec. 231, 2nd Div. Rev. Stat. 1879; re-en. Sec. 231, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2736, C. Civ. Proc. 1895; re-en. Sec. 7609, Rev. C. 1907; re-en. Sec. 10263, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1587.

Executors and Administrators ⇨ 438 (4).

34 C.J.S. Executors and Administrators § 746.

91-3208. (10264) May compound. Whenever a debtor of the decedent is unable to pay all his debts, the executor or administrator, with the approbation of the court or judge, may compound with him and give him a discharge, upon receiving a fair and just dividend of his effects. A compromise may also be authorized when it appears to be just, and for the best interest of the estate.

History: En. Sec. 232, p. 302, L. 1877; re-en. Sec. 232, 2nd Div. Rev. Stat. 1879; re-en. Sec. 232, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2737, C. Civ. Proc. 1895; re-en. Sec. 7610, Rev. C. 1907; re-en. Sec. 10264, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1588.

Executors and Administrators ⇨ 87.

33 C.J.S. Executors and Administrators §§ 168, 181.

Power and responsibility of executor or administrator in respect of waiver or compromise of claim to estate. 85 ALR 176.

Operation and Effect

The court having first determined the necessity of a compromise may authorize the administrator to settle a claim "to the best advantage possible." The public administrator has the same power in this respect as an executor or administrator. *Mulville v. Pacific Life Ins. Co.*, 19 M 95, 102, 103, 47 P 650.

References

Barbarich v. Chicago etc. Ry. Co. et al., 92 M 1, 11, 9 P 2d 797.

Right of executor or administrator to settle or compromise action or cause of action for death; and power of probate court to authorize such settlement. 103 ALR 445.

Return or tender of consideration for relief or compromise of interest in decedent's estate as condition of action for rescission or cancellation, action upon original claim, or action for damages sustained by the fraud inducing the release or compromise. 134 ALR 164.

91-3209. (10265) **Recovery of property fraudulently disposed of by testator.** When there is a deficiency of assets in the hands of an executor or administrator, and when the decedent, in his lifetime, has conveyed any real estate, or any rights or interests therein, with intent to defraud his creditors, or to avoid any right, debt, or duty of any person, or has so conveyed such estate that by law the deeds or conveyances are void as against creditors, the executor or administrator must commence and prosecute to final judgment any proper action for the recovery of the same; and may recover for the benefit of the creditors all such real estate so fraudulently conveyed; and may also, for the benefit of the creditors, sue and recover all goods, chattels, rights, or credits which have been so conveyed by the decedent in his lifetime, whatever may have been the manner of such fraudulent conveyance.

History: En. Sec. 233, p. 302, L. 1877; re-en. Sec. 233, 2nd Div. Rev. Stat. 1879; re-en. Sec. 233, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2738, C. Civ. Proc. 1895; re-en. Sec. 7611, Rev. C. 1907; re-en. Sec. 10265, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1589.

References

Cited or applied as sec. 7611, Revised

Codes, in Plains Land & Improvement Co. v. Lynch, 38 M 271, 283, 99 P 847.

Executors and Administrators 86, 426.

33 C.J.S. Executors and Administrators §§ 123, 124, 168 et seq., 253, 258, 267, 300; 34 C.J.S. Executors and Administrators § 692.

91-3210. (10266) **When executor or administrator to sue, as provided in preceding section.** No executor or administrator is bound to sue for such estate, as mentioned in the preceding section, for the benefit of the creditors, unless on application of creditors, who must pay such part of the costs and expenses of the suit, or give such security to the executor or administrator therefor, as the court or judge shall direct.

History: En. Sec. 234, p. 302, L. 1877; re-en. Sec. 234, 2nd Div. Rev. Stat. 1879; re-en. Sec. 234, 2nd Div. Comp. Stat. 1887;

re-en. Sec. 2739, C. Civ. Proc. 1895; re-en. Sec. 7612, Rev. C. 1907; re-en. Sec. 10266, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1590.

91-3211. (10267) **Disposition of estate recovered.** All real estate so recovered must be sold for the payment of debts, in the same manner as if the decedent had died seized thereof, upon obtaining an order therefor from the court or judge; and the proceeds of all goods, chattels, rights, and credits so recovered must be appropriated in payment of the debts of the decedent, in the same manner as other property in the hands of the executor or administrator.

History: En. Sec. 235, p. 302, L. 1877; re-en. Sec. 235, 2nd Div. Rev. Stat. 1879; re-en. Sec. 235, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2740, C. Civ. Proc. 1895; re-en. Sec. 7613, Rev. C. 1907; re-en. Sec. 10267, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1591.

References

Cited or applied as section 7613, Revised

Codes, in Plains Land & Improvement Co. v. Lynch, 38 M 271, 283, 99 P 847.

Executors and Administrators 271-274, 329 (1).

34 C.J.S. Executors and Administrators §§ 368, 478-490, 549-551.

91-3212. (10267.1) **Chattel mortgages, power of representative or guardian to make.** Whenever in any estate now being administered or that may hereafter be administered or in any guardianship proceeding now pending or that may hereafter be pending it shall appear to the district court, or to a judge thereof, to be for the advantage of the estate to borrow and raise

money upon a note or notes, to be secured by chattel mortgage or other lien upon the personal property of any decedent or of a minor or an incompetent person, or any part thereof, for the purpose of paying the debts of such decedent or such minor or incompetent person, the expenses of administration, or the expenses of caring for and preserving the estate of the decedent or ward; or paying, reducing, extending, or renewing some lien or chattel mortgage already existing on said personal property, or any part thereof, or paying the expenses of caring for, preserving and carrying on the business of the decedent or ward during the administration of the estate, the court or judge, as often as occasion therefor shall arise in the administration of any estate or in the course of any guardianship, may authorize, empower and direct the executors or administrators or guardian of such minor or incompetent person to mortgage such personal property, or any part thereof, or to give other security by way of pledge or other lien upon such personal property, or any part thereof, and to execute a note or notes, to be secured by such mortgage, pledge or lien;

Provided, that in order to obtain such authorization the same proceedings shall be had and taken as set forth in sections 91-3101 to 91-3108, inclusive, and which are required therefore to obtain an order to mortgage real property of the estate, and upon such proceedings being had the court shall have power to authorize the executor or administrator or guardian of such minor or incompetent person to borrow and raise money and to execute a note or notes and mortgages or pledge or other lien upon the personal property of the estate of such decedent or minor or incompetent person in the same manner and to the same extent and with the same effect as is provided in sections 91-3101 to 91-3108, inclusive, with reference to mortgages of real property.

History: En. Sec. 1, Ch. 22, L. 1933.

§ 303; 34 C.J.S. Executors and Administrators §§ 536, 555, 556 et seq., 654.

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21 Am. Jur. 510, Executors and Administrators, § 243; 25 Am. Jur. 74, Guardian and Ward, §§ 117 et seq.

33 C.J.S. Executors and Administrators

CHAPTER 33

CONVEYANCE OF REAL ESTATE BY EXECUTORS AND ADMINISTRATORS

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| Section | 91-3301. | Executor or administrator to complete contracts for sale of real estate. |
| | 91-3302. | Petition for executor or administrator to make conveyance and notice of hearing. |
| | 91-3303. | Interested parties may contest. |
| | 91-3304. | Conveyances—when order to be made. |
| | 91-3305. | Execution of conveyance and record thereof—how enforced. |
| | 91-3306. | Rights of petitioner to enforce contract. |
| | 91-3307. | Effect of conveyance. |
| | 91-3308. | Effect of recording a copy of the order. |
| | 91-3309. | Recording order does not supersede power of court to enforce it. |
| | 91-3310. | Where the party to whom conveyance to be made is dead. |
| | 91-3311. | Order may direct possession to be surrendered. |
| | 91-3312. | Validation of sales—curative deeds. |
| | 91-3313. | Record as evidence. |

91-3301. (10268) Executor or administrator to complete contracts for sale of real estate. When a person who is bound by contract in writing to convey any real estate dies before making the conveyance, and in all cases

when such decedent, if living, might be compelled to make such conveyance, the court or judge may make an order authorizing and directing his executor or administrator to convey such real estate to the person entitled thereto.

History: En. Sec. 236, p. 302, L. 1877; re-en. Sec. 236, 2nd Div. Rev. Stat. 1879; re-en. Sec. 236, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2750, C. Civ. Proc. 1895; re-en. Sec. 7614, Rev. C. 1907; re-en. Sec. 10268, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1597.

Operation and Effect

A petition to compel an executor or administrator to convey real estate, is sufficient where it sets forth the contract at length and alleges an adequate consideration. It need not contain all the essential averments of a bill in equity for the specific performance of a contract, nor is it necessary for the allegations of the petition to avoid every negative statement contained in sec. 17-808. In *re Grogan's Estate*, 38 M 540, 542, 100 P 1044.

The district court sitting in probate has but a special and limited jurisdiction, with such powers as are expressly granted by statute or necessarily implied to give effect to those expressly granted; and if such court has jurisdiction to compel the specific performance of a contract of a decedent to convey real property, it may act only in a case falling squarely within the provisions of this section and the fol-

lowing, i.e., where the contract is in writing, and the right of the petitioner is placed beyond doubt by the proof, within its sound legal discretion. In *re Bank's Estate*, 80 M 159, 166 et seq., 260 P 128.

Quaere: Since the power to enforce specific performance of a contract is vested solely in courts of equity, did the legislative assembly have power to confer upon the district court, sitting in probate, authority to enforce written contracts for the conveyance of real estate under which decedents bound themselves in their lifetime to make conveyance, as it has done by this section, et seq.? In *re Bank's Estate*, 80 M 159, 166 et seq., 260 P 128.

References

Cited or applied as sec. 7614, Revised Codes, in *Tyler v. Tyler*, 50 M 65, 72, 144 P 1090; *Kern et al. v. Robertson*, 92 M 283, 292, 12 P 2d 565; In *re Day's Estate*, — M —, 177 P 2d 862, 865.

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33 C.J.S. Executors and Administrators § 267.

Conveyance, generally. 55 Am. Jur. 743, Vendor and Purchaser, §§ 311 et seq.

91-3302. (10269) Petition for executor or administrator to make conveyance and notice of hearing. On the presentation of a verified petition by the executor or administrator, or by any person claiming to be entitled to such conveyance from an executor or administrator, setting forth the facts upon which the claim is predicated, the court, or a judge thereof, shall appoint a time and place for hearing the petition, and shall order notice thereof to be served on the executor or administrator personally when he is not the petitioner, and a copy thereof served upon each known heir, or, in the event of minor or incompetent heirs, upon the duly appointed and qualified guardian for such incompetent or minor, not less than twenty (20) days prior to the date of said hearing; or the court may order notice by publication for four successive weeks in such newspaper in the county as the court may designate, provided, however, that if such contract was of record at the date of the death of the person executing such contract, then, in that event, notice of such hearing may be given by serving such notice on the executor or administrator personally, when he is not the petitioner, and posting such notice in three public places in the county where the court is held, for at least (10) days prior to the day fixed for the hearing; provided, further, that if the written consent of all the known heirs over the age of twenty-one (21) years and the guardian, duly authorized, of all minor or incompetent heirs be obtained and filed in the court before which said hearing is pending, then no other or further notices shall be required.

History: En. Sec. 237, p. 302, L. 1877; re-en. Sec. 237, 2nd Div. Rev. Stat. 1879; re-en. Sec. 237, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2751, C. Civ. Proc. 1895; re-en. Sec. 7615, Rev. C. 1907; re-en. Sec. 10269, R. C. M. 1921; amd. Sec. 1, Ch. 173, L. 1937. Cal. C. Civ. Proc. Sec. 1598.

References

In re Bank's Estate, 80 M 159, 166, 260 P 128; In re Day's Estate, ___ M ___, 177 P 2d 862, 865.

91-3303. (10270) Interested parties may contest. At the time and place appointed for the hearing, or at such other time to which the same may be postponed, upon satisfactory proof by affidavit or otherwise, of the due publication of the notice, the court or judge must proceed to a hearing, and all persons interested in the estate may appear and contest such petition, by filing their objections in writing, and the court or judge may examine, on oath, the petitioner and all who may be produced before him for that purpose.

History: En. Sec. 238, p. 303, L. 1877; re-en. Sec. 238, 2nd Div. Rev. Stat. 1879; re-en. Sec. 238, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2752, C. Civ. Proc. 1895; re-en. Sec. 7616, Rev. C. 1907; re-en. Sec. 10270, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1599.

Operation and Effect

Where a petition, filed by an administrator under this section, to enforce a contract by deceased to convey certain water rights, did not show on its face that the contract was in writing, but rather im-

plied the contrary, it could not be presumed, in support of the probate court's decree enforcing specific performance, that the contract was in writing, and that the court had jurisdiction to enforce the same. Bullerdiek v. Hermesmeyer, 32 M 541, 552, 81 P 334.

References

In re Bank's Estate, 80 M 159, 166, 260 P 128; In re Day's Estate, ___ M ___, 177 P 2d 862, 865.

91-3304. (10271) Conveyances—when order to be made. If, after a full hearing upon the petition and objections, and examination of the facts and circumstances of the claim, the court or judge is satisfied that the petitioner is entitled to a conveyance of the real estate described in the petition, an order, authorizing and directing the executor or administrator to execute a conveyance thereof to the petitioner, must be made, entered on the minutes of the court, and recorded.

History: En. Sec. 239, p. 303, L. 1877; re-en. Sec. 239, 2nd Div. Rev. Stat. 1879; re-en. Sec. 239, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2753, C. Civ. Proc. 1895; re-en. Sec. 7617, Rev. C. 1907; re-en. Sec. 10271, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1600.

References

In re Day's Estate, ___ M ___, 177 P 2d 862, 865.

91-3305. (10272) Execution of conveyance and record thereof—how enforced. The executor or administrator must execute the conveyance according to the directions of the order, a certified copy of which must be recorded with the deed in the office of the county clerk of the county where the lands lie, and is prima facie evidence of the correctness of the proceedings, and of the authority of the executor or administrator to make the conveyance.

History: En. Sec. 240, p. 303, L. 1877; re-en. Sec. 240, 2nd Div. Rev. Stat. 1879; re-en. Sec. 240, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2754, C. Civ. Proc. 1895; re-en. Sec. 7618, Rev. C. 1907; re-en. Sec. 10272, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1601.

References

In re Day's Estate, ___ M ___, 177 P 2d 862, 865.

91-3306. (10273) Rights of petitioner to enforce contract. If, upon hearing, as hereinbefore provided, the right of the petitioner to have a specific performance of the contract is found to be doubtful, the court or judge must dismiss the petition without prejudice to the right of the petitioner, who may, at any time within six months thereafter, proceed by action to enforce a specific performance thereof.

History: En. Sec. 241, p. 303, L. 1877; re-en. Sec. 241, 2nd Div. Rev. Stat. 1879; re-en. Sec. 241, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2755, C. Civ. Proc. 1895; re-en. Sec. 7619, Rev. C. 1907; re-en. Sec. 10273, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1602.

Operation and Effect

Statutes of nonclaim deal with such debts and demands against a decedent as might have been enforced against him by personal action for the recovery of a money judgment; hence do not apply to a right of action for the specific performance of a contract to convey real property; the owner of such a right of action is not a creditor of the estate and is not required to present a claim to the executor or administrator within the time prescribed by this section. In re Bank's Estate, 80 M 159, 167 et seq., 260 P 128.

Id. Where the allegations of a petition filed in the probate court in an estate matter pending therein, seeking specific performance of a contract to convey real property made by defendant administrator's intestate prior to his death, and the proof adduced showed a departure from the letter of the agreement in a number of particulars, i.e., nonperformance by petitioner of conditions imposed upon him by the written agreement to convey, the court may not be held to have abused its discretion in dismissing the petition under this section, on the ground that petitioner's right to the relief asked for was doubtful.

References

In re Day's Estate, ___ M ___, 177 P 2d 862, 865.

91-3307. (10274) Effect of conveyance. Every conveyance, made in pursuance of an order as provided in this chapter, shall pass the title to the estate contracted for, as fully as if the contracting party himself were still living, and executed the conveyance.

History: En. Sec. 242, p. 304, L. 1877; re-en. Sec. 242, 2nd Div. Rev. Stat. 1879; re-en. Sec. 242, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2756, C. Civ. Proc. 1895; re-en. Sec. 7620, Rev. C. 1907; re-en. Sec. 10274, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1603.

References

In re Day's Estate, ___ M ___, 177 P 2d 862, 865.

91-3308. (10275) Effect of recording a copy of the order. A copy of the order for a conveyance, as provided in this chapter, duly certified and recorded in the office of the county clerk of the county where the lands lie, gives the person entitled to the conveyance a right to the possession of the lands contracted for, and to hold the same according to the terms of the intended conveyance, in like manner as if they had been conveyed in pursuance of the order.

History: En. Sec. 243, p. 304, L. 1877; re-en. Sec. 243, 2nd Div. Rev. Stat. 1879; re-en. Sec. 243, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2757, C. Civ. Proc. 1895; re-en. Sec. 7621, Rev. C. 1907; re-en. Sec. 10275, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1604.

References

In re Day's Estate, ___ M ___, 177 P 2d 862, 865.

91-3309. (10276) Recording order does not supersede power of court to enforce it. The recording of the order, as provided in the preceding section, shall not prevent the court or judge making the order from enforcing the same by other process.

History: En. Sec. 244, p. 304, L. 1877; re-en. Sec. 244, 2nd Div. Rev. Stat. 1879;

re-en. Sec. 244, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2758, C. Civ. Proc. 1895; re-en.

Sec. 7622, Rev. C. 1907; re-en. Sec. 10276,

R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1605.

References

In re Day's Estate, ___ M ___, 177 P 2d 862, 865.

91-3310. (10277) Where the party to whom conveyance to be made is dead. If the person entitled to the conveyance dies before the commencement of proceedings therefor under this chapter, or before the completion of the conveyance, any person entitled to succeed to his rights in the contract, or the executor or administrator of such decedent, may, for the benefit of the person so entitled, commence such proceedings or prosecute any already commenced, and the conveyance must be so made as to vest the estate in the persons entitled to it, or in the executor or administrator, for their benefit.

History: En. Sec. 245, p. 304, L. 1877; re-en. Sec. 245, 2nd Div. Rev. Stat. 1879; re-en. Sec. 245, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2759, C. Civ. Proc. 1895; re-en. Sec. 7623, Rev. C. 1907; re-en. Sec. 10277, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1606.

References

In re Day's Estate, ___ M ___, 177 P 2d 862, 865.

91-3311. (10278) Order may direct possession to be surrendered. The order provided for in this chapter may direct the possession of the property therein described to be surrendered to the person entitled thereto, upon his producing the deed and a certified copy of the order, when, by the terms of the contract, possession is to be surrendered.

History: En. Sec. 246, p. 304, L. 1877; re-en. Sec. 246, 2nd Div. Rev. Stat. 1879; re-en. Sec. 246, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2760, C. Civ. Proc. 1895; re-en. Sec. 7624, Rev. C. 1907; re-en. Sec. 10278, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1607.

References

In re Day's Estate, ___ M ___, 177 P 2d 862, 865.

91-3312. (10279) Validation of sales—curative deeds. All sales by executors and administrators of their decedent's real and personal property, and all sales by guardians of their ward's real and personal property, in this state, which, previous to the date of this amendatory act, were made to purchasers for a valuable consideration, which consideration has been paid by such purchasers to such executors or administrators or guardians, or their successors, in good faith, and such sales shall not have been set aside by the district or probate court having jurisdiction thereof, shall be sufficient to sustain an executor's or administrator's or guardian's deed or conveyance to such purchaser for such real or personal property; and, in case such deed or conveyance shall not have been given, shall entitle such purchaser to such deed or conveyance; and such deed or conveyance, if now executed or when executed, shall be sufficient to convey to such purchaser all the title that such decedent or ward had in said real or personal property; and all irregularities in obtaining the order of the court for such sale, and all irregularities or defects in making or conducting such sale by said executor or administrator or guardian, shall be disregarded, and such sale shall not be invalidated by reason of any such defect or irregularity.

History: En. Sec. 3, p. 145, L. 1899; re-en. Sec. 7625, Rev. C. 1907; amd. Sec. 1, Ch. 4, L. 1915; re-en. Sec. 10279, R. C. M. 1921; amd. Sec. 1 Ch. 118, L. 1939.

Operation and Effect

A curative statute of this nature does not apply to a mortgage by a guardian of land of his ward, given to secure debts

contracted for the perfecting of the ward's title thereto. An act of the legislature cannot give life to a judgment void for want of jurisdiction at the time of its rendition. *Davidson v. Wampler*, 29 M 61, 70, 74 P 82. See also *Cooper v. City of Bozeman*, 54 M 277, 285, 169 P 801; *Crawford v. Pierce*, 56 M 371, 376, 185 P 315.

Where a decree of a probate court for specific performance of a contract by decedent in his lifetime to convey certain water rights to his wife was void for want of jurisdiction in the court at the time of its rendition, it was not validated by an act, subsequently passed, to validate judicial sales by executors and administrators. *Bullerdick v. Hermsmeyer*, 32 M 541, 552, 81 P 334.

A mere clerical error in writing in the wrong range in a description of land in the order of sale is to be disregarded where but one piece of land is involved, where no one was misled by the mistake, and where the heirs reaped the benefit. *Plains Land & Improvement Co. v. Lynch*, 38 M 271, 289, 99 P 847.

Under the constitutional provision that no one shall be deprived of property without due process of law, a curative act cannot go to the extent of supplying jurisdiction where there was none in the first instance because of lack of notice and an opportunity to be heard. *Lamont v. Vinger*, 61 M 530, 544, 202 P 769.

Id. Held, under the preceding rule, that this section, providing that irregularities in obtaining an order of court for the sale of real property of an intestate shall not invalidate the sale was ineffectual to cure the fatal omission of the court to take the steps necessary to give it jurisdiction to make the order.

References

Harwood v. Scott, 65 M 521, 530, 211 P 316.

Executors and Administrators—148, 167, 388 et seq.; *Guardian and Ward*—41-43, 108.

33 C.J.S. *Executors and Administrators* §§ 271, 293, 320; 39 C.J.S. *Guardian and Ward* §§ 82, 83, 139.

91-3313. (10280) Record as evidence. When such deeds or conveyances so executed shall have been recorded in the records of deeds in the proper county, such record, duly certified by the county clerk, shall be evidence in all courts, and have the same effect as the original.

History: En. Sec. 4, p. 146, L. 1899; re-en. Sec. 7626, Rev. C. 1907; re-en. Sec. 10280, R. C. M. 1921. Codes, in *Tyler v. Tyler*, 50 M 65, 72, 144 P 1090.

References

Cited or applied as sec. 7626, Revised

Evidence—343 (3).

32 C.J.S. *Evidence* § 660.

CHAPTER 34

LIABILITIES AND COMPENSATION OF EXECUTORS AND ADMINISTRATORS

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| Section | 91-3401. When executor or administrator personally liable. |
| | 91-3402. Executor or administrator to be charged with all estate, etc. |
| | 91-3403. Not to profit or lose by estate. |
| | 91-3404. Uncollected debts without fault. |
| | 91-3405. Expenses allowed executor or administrator—attorney's fees—compensation of executor provided in will. |
| | 91-3406. Not to purchase claims against the estate. |
| | 91-3407. Compensation of executors and administrators. |

91-3401. (10281) When executor or administrator personally liable. No executor or administrator is chargeable upon any special promise to answer damages or to pay the debts of the testator or intestate out of his own estate, unless the agreement for that purpose, or some memorandum or note thereof, is in writing and signed by such executor or administrator, or by some other person by him thereunto especially authorized.

History: En. Sec. 247, p. 304, L. 1877; re-en. Sec. 247, 2nd Div. Comp. Stat. 1887; re-en. Sec. 247, 2nd Div. Rev. Stat. 1879; re-en. Sec. 2770, C. Civ. Proc. 1895; re-en.

Sec. 7627, Rev. C. 1907; re-en. Sec. 10281, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1612.

Executors and Administrators—100.

33 C.J.S. Executors and Administrators § 204.

21 Am. Jur. 511, Executors and Administrators, §§ 244-249.

Liability of executor or administrator on his bond for loss of money deposited in

bank in his representative capacity. 60 ALR 488.

Liability of executor or administrator for loss by depreciation in value of securities, through retaining or deferring sale thereof. 92 ALR 436.

Liability of sureties on bond of executor or administrator in respect of proceeds of sale of real estate on execution or under orders of court for payment of debts or distribution. 104 ALR 203.

91-3402. (10282) Executor or administrator to be charged with all estate, etc. Every executor and administrator is chargeable in his account with the whole of the estate of the decedent which may come into his possession, at the value of the appraisal contained in the inventory, except as provided in the following sections, and with all the interest, profit, and income of the estate.

History: En. Sec. 248, p. 305, L. 1877; re-en. Sec. 248, 2nd Div. Rev. Stat. 1879; re-en. Sec. 248, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2771, C. Civ. Proc. 1895; re-en. Sec. 7628, Rev. C. 1907; re-en. Sec. 10282, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1613.

Executor Not Insurer of Assets—Liability

Where a testator named a person as executor to serve without bond, giving him wide and discretionary powers in administration, similar to those he, himself employed in carrying on his livestock business, he is required to act in entire good faith but is not an insurer of the assets of the estate, nor is he expected to be infallible, but is only liable for losses because of bad faith or want of due diligence; it is the policy of courts to sustain their acts in good faith, if possible, and where no attempt was made for five years after approval of his accounts to penalize or remove him fraud or detriment must be shown to hold him for alleged losses. *Montgomery v. Gilbert*, 111 M 250, 271, 108 P 2d 616.

Operation and Effect

The employment and payment of counsel is a personal matter between the administrator and the attorney, over which the court has no authority, except for allowance or disallowance of the amount paid when presented as other claims. *State ex rel. Kelly v. District Court*, 25 M 33, 37, 63 P 717.

An executor or administrator is chargeable not only with the assets of the estate which actually came into his hands, but also with those—including rents and profits of real estate which in the exercise of ordinary care and diligence ought to have been received from it—which by reason of his neglect he has failed to get into

his hands. *In re Dolenty's Estate*, 53 M 33, 39, 161 P 524.

Where at the time of the appointment of an administrator there were crops growing upon the lands of the estate, which but for timely care and harvesting might have been lost, he may be allowed the reasonable expense incurred in that behalf, even though he obtained the necessary funds by borrowing upon the credit of the estate without first obtaining an order of court permitting him to do so. *In re Jennings' Estate*, 74 M 449, 463, 241 P 648.

Id. Where an administrator himself occupies the real property of the decedent's estate or by his negligence fails to secure from it such rents and profits as it ought to yield, he is chargeable with such reasonable revenue as the property should have brought, as well as with interest at the legal rate upon the annual rentals, from the time they should have been paid.

Id. Estate funds used by an administrator in purchasing farm machinery used by him in operating a farm owned by the estate as his own, he is chargeable with the amount paid therefor, with interest, as well as with produce of livestock not accounted for and stock killed for his own use while so operating the property.

Id. Without an order of court to that effect, an administrator may not borrow money and pledge the credit of the estate therefor (unless, perhaps, in case of emergency), and where he does so he is personally liable for interest thereon.

Where an executor invests estate funds without authority of court in the purchase of a note, he is properly chargeable with any loss sustained by the estate resulting therefrom. *In re Connolly's Estate*, 79 M 445, 457, 257 P 418.

An administrator is not an insurer of the assets of the estate represented by him, and if he deposits its funds with a responsible bank, acting in good faith in the ex-

ercise of his best judgment, he is not liable for loss occasioned by its failure. In re Mullen's Estate, 97 M 144, 152, 33 P 2d 270.

Id. To charge an administrator with the loss of estate funds in a closed bank, of which he was cashier, the evidence must show that he was negligent in not removing them before its closing, negligence in that behalf being the failure to do what a reasonable and prudent person would ordinarily have done in the circumstances of the situation.

Id. Where cashier's checks drawn against the savings account of an estate were not paid owing to the bank's closing, although their amount was deducted from the account, and the administrator failed

to present a claim to the receiver for its allowance within the proper time and the estate lost the amount through his neglect, he should be charged therewith.

References

Maygar v. St. Louis Min. etc. Co., 68 M 492, 500, 219 P 1102; In re Bradfield's Estate, 69 M 247, 261, 221 P 531; In re Connolly's Estate, 73 M 35, 55, 235 P 408; Swanberg v. National Surety Co., 86 M 340, 355, 283 P 761; In re Astibia's Estate, 100 M 224, 235, 46 P 2d 712; In re Walker's Estate, 111 M 66, 71, 106 P 2d 341.

Executors and Administrators—475-478.

34 C.J.S. Executors and Administrators § 850.

91-3403. (10283) Not to profit or lose by estate. He shall not make profit by the increase, nor suffer loss by the decrease or destruction, without his fault, of any part of the estate. He must account for the excess when he sells any part of the estate for more than the appraisement, and if any is sold for less than the appraisement, he is not responsible for the loss, if the sale has been justly made.

History: En. Sec. 249, p. 305, L. 1877; re-en. Sec. 249, 2nd Div. Rev. Stat. 1879; re-en. Sec. 249, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2772, C. Civ. Proc. 1895; re-en. Sec. 7629, Rev. C. 1907; re-en. Sec. 10283, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1614.

Operation and Effect

An executor or administrator is not liable for losses to the estate occurring through no fault of his, and is entitled to compensation for his services. In re Dolenty's Estate, 53 M 33, 39, 161 P 524.

An executor fulfills his trust obligation to the estate for which he acts when he deposits its funds temporarily with a responsible bank, and where he acts in good faith and in the exercise of his best judgment

in making the deposit, he is not liable for loss occasioned by the subsequent failure of such bank. In re Connolly's Estate, 79 M 445, 457, 257 P 418.

References

In re Connolly's Estate, 73 M 35, 45, 235 P 408; In re Mullen's Estate, 97 M 144, 152, 33 P 2d 270; In re Astibia's Estate, 100 M 224, 235, 46 P 2d 712; In re Walker's Estate, 111 M 66, 71, 106 P 2d 341.

Executors and Administrators—103 et seq., 115, 476½.

33 C.J.S. Executors and Administrators §§ 206, 207 et seq., 239-241; 34 C.J.S. Executors and Administrators § 850.

91-3404. (10284) Uncollected debts without fault. No executor or administrator is accountable for any debts due the decedent, if it appears that they remain uncollected without his fault.

History: En. Sec. 250, p. 305, L. 1877; re-en. Sec. 250, 2nd Div. Rev. Stat. 1879; re-en. Sec. 250, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2773, C. Civ. Proc. 1895; re-en. Sec. 7630, Rev. C. 1907; re-en. Sec. 10284, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1615.

Operation and Effect

Where a defaulting vendee of farm lands in consideration of being permitted to remain in possession agreed in writing to give the vendor a promissory note secured by a crop mortgage for moneys due, an equitable lien was created though neither note nor mortgage were ever given, which lien the administrator of the estate

of the vendor knowing of its existence, was in duty bound to collect, if possible, and for his failure to attempt to collect he was chargeable in his account for the resulting loss. Scott et al. v. Tuggle, 74 M 476, 482, 483, 241 P 229.

Id. An administrator may not excuse his failure to collect a debt due to the estate of his decedent by reliance upon the advice of an attorney that an attempt to collect would result in litigation and delay in settlement of the estate.

Where indebtedness due an estate remains unpaid, the burden rests upon the executor or administrator, if he would escape liability, to show that his failure to

make collection was not the result of his own neglect. In re Connolly's Estate, 79 M 445, 462, 257 P 418.

Id. Where an executor became indebted to his testator during the latter's lifetime on a joint note secured by pledge of corporate stock which after maturity and after the estate came into his hands was worth around par and payment of which note could have been secured but for his failure to take timely action, the executor was properly held liable for the balance due on the instrument.

When Interest Chargeable

When ordered by court to sell for cash, but administrator sold on credit and without security after unnecessary delay, held

that he is chargeable with interest at legal rate of six per cent from date money should have been received together with loss in selling price from that date and date when sheep were thereafter sold. In re Astibia's Estate, 100 M 224, 236, 46 P 2d 712.

References

Maygar v. St. Louis Min. etc. Co., 68 M 492, 500, 219 P 1102; In re Connolly's Estate, 73 M 35, 45, 235 P 408; Swanberg v. National Surety Co., 86 M 340, 355, 283 P 761.

Executors and Administrators—86 (1).
33 C.J.S. Executors and Administrators
§§ 167, 168, 169, 173-175, 178, 180, 190.

91-3405. (10285) Expenses allowed executor or administrator — attorney's fees — compensation of executor provided in will. The executor and administrator shall be allowed all necessary expenses in the care, management, and settlement of the estate, including a reasonable fee paid to attorneys for conducting the necessary proceedings and for conducting necessary actions in courts, or incurred therefor, the amount of which attorneys' fees shall be in all cases, in the absence of agreement, fixed and determined by the court having jurisdiction of the settlement of the estate, and for his services such fees as provided in this chapter; but when the decedent, by his will, makes some other provision for the compensation of his executor, that shall be a full compensation for his services, unless, by a written instrument filed in court, he renounces all claims for compensation provided for by the will.

History: En. Sec. 251, p. 305, L. 1877; re-en. Sec. 251, 2nd Div. Rev. Stat. 1879; re-en. Sec. 251, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2774, C. Civ. Proc. 1895; re-en. Sec. 7631, Rev. C. 1907; amd. Sec. 1, Ch. 55, L. 1919; re-en. Sec. 10285, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1616.

Cross-Reference

Compensation of attorneys, sec. 93-8601.

Attorney's Fees

If an administrator pays his attorney, in anticipation of an allowance by the court for attorney's fees, he acts at his peril; he can be allowed only necessary expenses in the care, management, and settlement of the estate, and his judgment may be rejected by the court on the score of the amount as well as of necessity. State ex rel. Cohen v. District Court, 53 M 210, 212, 162 P 1053.

The amendment of this section made by Chapter 55, Laws of 1919, goes no further than to expressly authorize the district court sitting in probate to do what under the section before amendment it could do only under its implied power, viz.: to fix the amount to be allowed to the personal representative of an estate as compensa-

tion for the services of an attorney in advance of the actual payment of the fee by him, and therefore under it the court has not the power on the petition of an attorney to fix and allow to him directly the compensation due him from an administrator in his representative capacity, to be paid out of the funds of the estate as a legal claim against it. In re McClure's Estate, 68 M 556, 565, 220 P 527; In re Jennings' Estate, 74 M 468, 475, 241 P 655.

Allowance of payment made by an administrator to his attorney for services in the amount of \$270, and of a like amount to himself as compensation for his own services, held not improper where the estate amounted to some \$6,100, in view of the finding that there was no unreasonable delay in closing it, that the administrator acted in good faith throughout and was not subject to criticism for any action taken by him in the premises. In re Springer's Estate, 79 M 256, 267, 255 P 1058.

Id. In making an order fixing or allowing fees paid by an administrator to his counsel, the court must find that services of counsel were needed and that they were rendered for the benefit of the estate; hence where, after the administrator had

been removed from office, suit was brought against him as an individual and against his surety by his successor, the estate was not liable for the payment of such fees, even though the action was without foundation.

Id. Where an administrator made no showing why it was necessary to employ an attorney other than the one who had acted for the estate and who had been paid for his services in that behalf, to prepare the administrator's final account, the latter was not entitled to reimbursement for the expense incurred for that purpose.

Fees of Executors Guilty of Inordinate Delay

Under the facts presented, held that in fixing the fees of executors, the court should take into consideration the inordinate delay in distributing the estate, and the fee, under no possible theory, should exceed that fixed by this section et seq. *In re Ryan's Estate*, 109 M 340, 344, 96 P 2d 916.

"Necessary Expenses"

The burden is upon an executor or administrator on presenting his account, to establish his right to each item of expense for which he claims reimbursement; "necessary expenses," as used in this section held to mean actual expenses legally incurred by him; held, further, that a claim for mileage (3,283 miles) at seven cents per mile, for use of automobile, etc., and expense incident to making inventory and appraisement, in the absence of a statute fixing allowance of such expenses, and a proper itemization of the actual expense incurred, was properly disallowed. *Montgomery v. First National Bank of Dillon*, 114 M 428, 429, 136 P 2d 775.

Premium on Bond

For premiums paid by an administrator to a surety company for his official bond during the time he served as administrator he was properly allowed credit, the contention of contestant that the item should not have been allowed for the period for which settlement of the estate was unduly delayed being untenable in view of the finding of the court that there was no delay attributable to the administrator. *In re Springer's Estate*, 79 M 256, 267, 255 P 1058.

Ward's Right to Conduct Litigation and Select Attorney After His Majority

Ordinarily, the employment of an attorney continues until the completion of the proceeding for which he is employed, unless terminated by law or the act of himself or his client. A guardian has the right to conduct the litigation of his ward

including the selection of an attorney, but when the ward becomes of age, a definite break occurs, after which the former ward has that right, including the selection of his attorney without any control by the former guardian. There is no continuity over the break. *Mitchell v. McDonald*, 114 M 292, 301, 136 P 2d 536.

Operation and Effect

In matters relating to a will contest after probate, the special statute, sec. 91-1106, controls over the above general statute with respect to expenses and costs. *In re Kesl's Estate*, 117 M 377, 385, 161 P 2d 641.

References

First Nat. Bank v. Collins, 17 M 433, 436, 43 P 499; *State ex rel. Kelly v. District Court*, 25 M 33, 37, 63 P 717; *State ex rel. Cohen v. District Court*, 53 M 210, 212, 162 P 1053; *State ex rel. Eisenhower v. District Court*, 54 M 172, 174, 168 P 522; *State v. Daems*, 97 M 486, 497, 37 P 2d 322; *In re Astibia's Estate*, 100 M 224, 235, 46 P 2d 712.

Executors and Administrators—109-111, 488-501.

33 C.J.S. Executors and Administrators §§ 144, 217-222, 228-238; 34 C.J.S. Executors and Administrators § 389.

21 Am. Jur. Executors and Administrators, p. 666, §§ 510-518; p. 686, §§ 545 et seq.

Right to allowance out of estate of attorneys' fees incurred in attempt to establish or defeat will. 10 ALR 783.

Right of executor or administrator to extra compensation for legal services rendered by him. 36 ALR 748.

Allowance of attorney's fee against property or funds of estate of decedent rendered in protection of such estate. 49 ALR 1164.

Right of executor or administrator to extra compensation for services other than attorney's services. 66 ALR 512.

Allowance out of decedent's estate for services rendered by attorney not employed by executor or administrator. 79 ALR 521.

Right of executor or administrator to commissions as affected by fault in administration. 83 ALR 726.

Right of executor, administrator, or testamentary trustee to allowance of attorneys' fees and expenses incident to controversy over surcharging his account. 101 ALR 806.

Right of personal representative to allowance, out of property involved, for attorneys' fees or other expenses incurred in unsuccessful effort to claim the property for the estate. 126 ALR 1349.

Executors' or attorneys' fees and other expenses of administration of estate prior to establishment of fund as chargeable to corpus or to income. 135 ALR 1322.

Amount of attorney's compensation for

services in administration of decedent's estate. 143 ALR 735.

Validity, construction, and effect of provision in will regarding amount payable for attorneys' services. 148 ALR 362.

91-3406. (10286) Not to purchase claims against the estate. No executor or administrator shall purchase any claim against the estate he represents; and if he pays any claim for less than its nominal value, he is only entitled to charge in his account the amount he actually paid.

History: En. Sec. 252, p. 305, L. 1877; re-en. Sec. 252, 2nd Div. Rev. Stat. 1879; re-en. Sec. 252, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2775, C. Civ. Proc. 1895; re-en. Sec. 7632, Rev. C. 1907; re-en. Sec. 10286, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1617.

Executors and Administrators—115, 481. 33 C.J.S. Executors and Administrators §§ 239-241; 34 C.J.S. Executors and Administrators § 851.

91-3407. (10287) Compensation of executors and administrators. When no compensation is provided by the will, or the executor renounces all claims thereto, he must be allowed commissions upon the amount of the estate accounted for by him, as follows: For the first thousand dollars, at the rate of seven per cent.; for all above that sum, not exceeding ten thousand dollars, at the rate of five cent.; for all above ten thousand dollars, not exceeding twenty thousand dollars, at the rate of four per cent.; and for all above twenty thousand dollars, at the rate of two per cent. If there be more than one executor, only one commission must be allowed. The same commissions must be allowed to administrators. In all such cases further allowances may be made as the court or judge may deem just and reasonable for any extraordinary services. The total amount of such extra allowance must not exceed the total amount of commission allowed by this section.

History: En. Sec. 253, p. 305, L. 1877; re-en. Sec. 253, 2nd Div. Rev. Stat. 1879; re-en. Sec. 253, 2nd Div. Comp. Stat. 1887; amd. Sec. 1, p. 59, Ex. L. 1887; amd. Sec. 2776, C. Civ. Proc. 1895; amd. Sec. 1, Ch. 4, L. 1905; re-en. Sec. 7633, Rev. C. 1907; re-en. Sec. 10287, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1618.

Operation and Effect

The claim of an administrator for fees is an inchoate right until ascertained and allowed upon a final accounting, and must be regulated by the law in force at the time thereof, and not by the law at the time of his appointment, unless such claim had become a vested right by reason of the services being fully performed prior to the passage of the latter law, and the fact appear upon such final account. In re Dewar's Estate, 10 M 426, 439, 25 P 1026. See also In re Ricker's Estate, 14 M 153, 180, 35 P 960.

The law regulating the fees of administrators is not a contract that the same compensation will not continue during the term of any incumbent; nor does the holding of such office create a vested right to receive for future services the fees es-

tablished at the time of his appointment. In re Dewar's Estate, 10 M 426, 440, 25 P 1026.

Whether an administrator is entitled to commissions as provided for by this section, is dependent upon whether he earned them, by attending to the duties of his trust with fidelity and in accordance with the provisions of the law; hence willful neglect and mismanagement of the estate are sufficient to authorize the court in withholding them or such part of them as it may see fit to withhold in the exercise of the discretion lodged in the court in that respect. In re Jennings' Estate, 74 M 468, 474, 241 P 655.

Allowance of payment made by an administrator to his attorney for services in the amount of \$270, and of a like amount to himself as compensation for his own services, held not improper where the estate amounted to some \$6,100, in view of the finding that there was no unreasonable delay in closing it, that the administrator acted in good faith throughout and was not subject to criticism for any action taken by him in the premises. In re Springer's Estate, 79 M 256, 266, 255 P 1058.

Where an executor, who was also named trustee in the will for certain purposes after his executorial duties were completed, never in his fourteen years of service acted as trustee, and the will, while providing for his compensation as trustee at five per cent of the gross income of the estate, did not fix his remuneration as executor; who on settlement of his accounts asked that his fee be fixed as executor only, as provided by this section, i.e., based upon the inventory value of the estate together with the rents, income and profits, the court erred in not so fixing it, but instead allowing him only five per cent of the total rents and income. In *re Kelley's Estate*, 91 M 98, 5 P 2d 559.

Where an estate was in condition to be closed at any time and there remained but few steps to be taken toward that end, and the value of the estate was \$53,093, warranting an attorney's fee of \$1,581 computed under the rules of court and this section, an order allowing a dismissed attorney \$1,315, leaving the sum of \$266 as compensation for services to be performed by his successor, held not improper.

In *re Culver's Estate*, 91 M 475, 479, 8 P 2d 662.

Where Administrator's Fee Based on Sale Price

This section provides that the administrator "must be allowed commissions upon the amount of the estate accounted for by him," based upon the schedule therein provided. Neither secs. 91-3402, 91-3403, nor this section infer that a sale may be made solely to reduce the administrator's fee. If grounds exist for a sale, and one is actually and justly made, then the sale price fixes the value on which the administrator's fee is based. In *re Walker's Estate*, 111 M 66, 71, 106 P 2d 341.

References

Cited or applied as section 7633, Revised Codes, in *re Dolenty's Estate*, 53 M 33, 39, 161 P 524.

Executors and Administrators—495-497.
34 C.J.S. Executors and Administrators
§§ 862-868, 874.

21 Am. Jur. 672, Executors and Administrators, §§ 519-537.

CHAPTER 35

ACCOUNTING AND SETTLEMENT BY EXECUTORS AND ADMINISTRATORS

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| Section | 91-3501. Exhibit of receipts and disbursements and claims allowed. |
| | 91-3502. Citation to account. |
| | 91-3503. Petition for citation to render exhibit. |
| | 91-3504. Citation to account on application. |
| | 91-3505. Objections to account, who may file. |
| | 91-3506. Attachment for not obeying the citation. |
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| | 91-3513. When settlement is final, notice must so state—final settlement, partition and distribution. |
| | 91-3514. Interested party may file exceptions to account. |
| | 91-3515. All matters may be contested by the heirs—hearing. |
| | 91-3516. Settlement of accounts to be conclusive, when and when not. |
| | 91-3517. Proof of notice of settlement of accounts. |
| | 91-3518. Sale of personal property in lieu of realty—when ordered. |
| | 91-3519. Moneys invested by order of court. |

91-3501. (10288) Exhibit of receipts and disbursements and claims allowed. Six months after his appointment, and at any time when required by the court or judge, either upon his own motion or upon the application of any person interested in the estate, the executor or administrator must render, for the information of the court or judge, an exhibit under oath, showing the amount of money received and expended by him, the amount of all claims presented against the estate, and the names of the claimants, and all other matters necessary to show the condition of its affairs.

History: En. Sec. 254, p. 306, L. 1877; re-en. Sec. 254, 2nd Div. Rev. Stat. 1879; re-en. Sec. 254, 2nd Div. Comp. Stat. 1887; amd. Sec. 2780, C. Civ. Proc. 1895; re-en. Sec. 7634, Rev. C. 1907; re-en. Sec. 10288, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1622.

Operation and Effect

It is not the intention of the law that the administrator should in every account give a full inventory of the assets of the estate. This properly belongs to the inventory which is filed, except the actual cash on hand, which the law appears to contemplate he should carry forward in his several accounts rendered to the court. Where, therefore, the account of an administrator gave a statement of the receipts and disbursements of money since his last report, it was a sufficient compliance with the requirement of the statute. In re Davis' Estate, 31 M 421, 425, 78 P 704.

Held, where executrix paid debts of corporation virtually owned by her husband, out of property of his estate to protect the assets, her failure to strictly follow statu-

tory directions as to presentment and approval of claims should not deprive her of the credits claimed, under the rule that where justice requires it courts may ignore corporate entities. In re Russell's Estate, 102 M 301, 308, 309, 59 P 2d 777.

References

Cited or applied as sec. 7634, Revised Codes, in State ex rel. King v. District Court, 42 M 182, 185, 111 P 717; State ex rel. Eisenhower v. District Court, 54 M 172, 175, 168 P 522; In re Jennings' Estate, 74 M 449, 456, 241 P 648; In re Jennings' Estate, 74 M 468, 472, 241 P 655; In re Rinio's Estate, 96 M 344, 347, 30 P 2d 803; In re Astibia's Estate, 100 M 224, 230, 46 P 2d 712; State ex rel. Regis v. District Court, 102 M 74, 79, 55 P 2d 1295.

Executors and Administrators—458 et seq.

34 C.J.S. Executors and Administrators §§ 828, 837.

21 Am. Jur. 656, Executors and Administrators §§ 491 et seq.

91-3502. (10289) Citation to account. If the executor or administrator fails to render an exhibit for six months after his appointment, the court or judge must cause a citation to be issued requiring him to appear and render it.

History: En. Sec. 255, p. 306, L. 1877; re-en. Sec. 255, 2nd Div. Rev. Stat. 1879; re-en. Sec. 255, 2nd Div. Comp. Stat. 1887; amd. Sec. 2781, C. Civ. Proc. 1895; re-en. Sec. 7635, Rev. C. 1907; re-en. Sec. 10289, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1623.

Executors and Administrators—468-472.

33 C.J.S. Executors and Administrators § 12; 34 C.J.S. Executors and Administrators §§ 837, 838, 840-844, 846, 848.

21 Am. Jur. 663, Executors and Administrators, §§ 505, 506.

Cross-Reference

Duty to file report, penalty for failure, sec. 94-3501.

91-3503. (10290) Petition for citation to render exhibit. Any person interested in any estate may, at any time before the final settlement of accounts, present his petition to the court or judge, praying that the executor or administrator be required to appear and render such exhibit, setting forth the facts showing that it is necessary and proper that such an exhibit should be made.

History: En. Sec. 256, p. 306, L. 1877; re-en. Sec. 256, 2nd Div. Rev. Stat. 1879; re-en. Sec. 256, 2nd Div. Comp. Stat. 1887;

re-en. Sec. 2782, C. Civ. Proc. 1895; re-en. Sec. 7636, Rev. C. 1907; re-en. Sec. 10290, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1624.

91-3504. (10291) Citation to account on application. If the court or judge is satisfied, either from the oath of the applicant or from any other testimony offered, that the facts alleged are true, and considers the showing of the applicant sufficient, he must direct a citation to be issued to the executor or administrator, requiring him to appear, at some day to be named in the citation, and render an exhibit as prayed for.

History: En. Sec. 257, p. 306, L. 1877; re-en. Sec. 257, 2nd Div. Rev. Stat. 1879; re-en. Sec. 257, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2783, C. Civ. Proc. 1895; re-en. Sec. 7637, Rev. C. 1907; re-en. Sec. 10291, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1625.

91-3505. (10292) Objections to account, who may file. When an exhibit is rendered by an executor or administrator, any person interested may appear, and, by objections in writing, contest any account or statement therein contained. The court or judge may examine the executor or administrator, and if he has been guilty of neglect, or has wasted, embezzled, or mismanaged the estate, his letters must be revoked.

History: En. Sec. 258, p. 306, L. 1877; re-en. Sec. 258, 2nd Div. Rev. Stat. 1879; re-en. Sec. 258, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2784, C. Civ. Proc. 1895; re-en. Sec. 7638, Rev. C. 1907; re-en. Sec. 10292, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1626. Civil Procedure, in *In re Tuohy's Estate*, 33 M 230, 246, 83 P 486.

Executors and Administrators 504, 505.
34 C.J.S. Executors and Administrators § 899 et seq.

References 21 Am. Jur. 665, Executors and Administrators, § 507.
Cited or applied as sec. 2784, Code of

91-3506. (10293) Attachment for not obeying the citation. If any executor or administrator neglects or refuses to appear and render an exhibit, after having been duly cited, an attachment may issue against him and such exhibit enforced, or his letters may be revoked, in the discretion of the court or judge.

History: En. Sec. 259, p. 307, L. 1877; re-en. Sec. 259, 2nd Div. Rev. Stat. 1879; re-en. Sec. 259, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2785, C. Civ. Proc. 1895; re-en. Sec. 7639, Rev. C. 1907; re-en. Sec. 10293, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1627. Executors and Administrators 35 (1), 472, 505.
33 C.J.S. Executors and Administrators § 90; 34 C.J.S. Executors and Administrators §§ 837, 844, 848, 899.

91-3507. (10294) To render accounts after notice to creditors. Within thirty days after the expiration of the time mentioned in the notice to creditors within which claims must be exhibited, every executor or administrator must render a full account and report of his administration. If he fails to present his account, the court or judge must compel the rendering of the account by attachment, and any person interested in the estate may apply for and obtain an attachment; but no attachment must issue unless a citation has been first issued, served, and returned, requiring the executor or administrator to appear and show cause why an attachment should not issue. Every account must exhibit all debts which have been presented and allowed during the period embraced in the account.

History: En. Sec. 260, p. 307, L. 1877; re-en. Sec. 260, 2nd Div. Rev. Stat. 1879; re-en. Sec. 260, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2786, C. Civ. Proc. 1895; re-en. Sec. 7640, Rev. C. 1907; re-en. Sec. 10294, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1628. 241 P 648; *In re Rinio's Estate*, 93 M 428, 433, 19 P 2d 322.

References Executors and Administrators 458 et seq., 502.
34 C.J.S. Executors and Administrators §§ 828, 837 et seq., 882.

In *re Jennings' Estate*, 74 M 449, 456,

91-3508. (10295) Accounting on removal or death of representative or guardian. When the authority of an executor, administrator or guardian ceases, or is revoked for any reason, he may be cited to account before the court or judge, at the instance of the person succeeding to the administration

of the same estate, in like manner as he might have been cited by any person interested in the estate during the time he was executor, administrator or guardian. If an executor, administrator or guardian dies, his accounts may be presented by his personal representative to and settled by the court in which the estate of which he was executor, administrator or guardian is being administered, and upon the petition of the successor of such deceased executor, administrator or guardian, such court may compel the personal representative of such deceased executor, administrator or guardian to render an account of the administration of his testator, intestate or ward, and must settle such account as in other cases.

History: En. Sec. 261, p 307, L. 1877; re-en. Sec. 261, 2nd Div. Rev. Stat. 1879; re-en. Sec. 261, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2787, C. Civ. Proc. 1895; re-en. Sec. 7641, Rev. C. 1907; amd. Sec. 1, Ch. 122, L. 1913; re-en. Sec. 10295, R. C. M. 1921; amd. Sec. 1, Ch. 11, L. 1927. Cal. C. Civ. Proc. Sec. 1629.

Operation and Effect

An action at law to recover from an administrator and his surety a money judgment for assets in the hands of the former does not lie until after accounting and settlement had in the probate proceedings. *O'Sullivan v. Alexander et al.*, 73 M 12, 16 et seq., 234 P 1099.

Id. The district court sitting in probate has the same jurisdiction in the matter of issuing process, under this section and 91-4307, as has the district court; hence

superior authority of the district court in that regard cannot be urged as a reason for invoking its jurisdiction, rather than that of the probate court, in an action against an administrator who had removed from the state, and his surety, to recover assets of the estate prior to settlement of the former's account.

References

Baker v. Hanson et al., 72 M 22, 32, 231 P 902; *In re Connolly's Estate*, 73 M 35, 64, 235 P 408; *In re Kern's Estate*, 96 M 443, 447, 31 P 2d 313.

Executors and Administrators—458-467. 33 C.J.S. Executors and Administrators § 191; 34 C.J.S. Executors and Administrators §§ 828-835, 837.

21 Am. Jur. 659, Executors and Administrators, §§ 496, 497.

91-3509. (10296) Revoking authority of executor, when. If the executor or administrator resides out of the county, or absconds, or conceals himself, so that the citation cannot be personally served, and neglects to render an account, within thirty days after the time prescribed in this chapter, or if he neglects to render an account within thirty days after being committed where the attachment has been executed, his letters must be revoked.

History: En. Sec. 262, p. 307, L. 1877; re-en. Sec. 262, 2nd Div. Rev. Stat. 1879; re-en. Sec. 262, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2788, C. Civ. Proc. 1895; re-en. Sec. 7642, Rev. C. 1907; re-en. Sec. 10296, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1630.

Executors and Administrators—35 (1). 33 C.J.S. Executors and Administrators § 90.

91-3510. (10297) To produce and file vouchers, which may remain in court. In rendering his account, the executor or administrator must produce and file vouchers for all charges, debts, claims, and expenses which he has paid, which must remain in the court; and he may be examined on oath touching such payments, and also touching any property and effects of the decedent, and the disposition thereof. When any voucher is required for other purposes, it may be withdrawn on leaving a certified copy on file; if a voucher is lost, or for other good reasons cannot be produced on the settlement, the payment may be proved by the oath of any competent witness.

History: En. Sec. 263, p. 308, L. 1877; re-en. Sec. 263, 2nd Div. Rev. Stat. 1879; re-en. Sec. 2789, C. Civ. Proc. 1895; re-en.

Sec. 7643, Rev. C. 1907; re-en. Sec. 10297, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1631.

Operation and Effect

Where an administrator made a showing relative to the absence of vouchers for certain amounts satisfactory to the court as required by this section, and the contestant did not offer any testimony to re-

fute it, approval of the amounts paid by the administrator will not be disturbed on appeal. In re Springer's Estate, 79 M 256, 265, 255 P 1058.

Executors and Administrators—503.

34 C.J.S. Executors and Administrators § 898.

91-3511. (10298) Vouchers for items less than twenty dollars—when dispensed with. On the settlement of his account, he may be allowed any item of expenditure not exceeding twenty dollars, for which no voucher is produced, if such item be supported by his own uncontradicted oath positive to the fact of payment, specifying when, where, and to whom it was made; but such allowances in the whole must not exceed five hundred dollars against any one estate, and if, upon such settlement of accounts, it appear that debts against the deceased have been paid without the affidavit and allowance prescribed by statute or sections 91-2705, 91-2706 and 91-2707, and it shall be proven by competent evidence to the satisfaction of the court or judge that such debts were justly due, were paid in good faith, that the amount paid was the true amount of such indebtedness over and above all payments or set-offs, and that the estate is solvent, it shall be the duty of the said court or judge to allow the said sums so paid in the settlement of said accounts.

History: En. Sec. 264, p. 308, L. 1877; re-en. Sec. 264, 2nd Div. Rev. Stat. 1879; re-en. Sec. 264, 2nd Div. Comp. Stat. 1887; amd. Sec. 2790, C. Civ. Proc. 1895; re-en. Sec. 7644, Rev. C. 1907; re-en. Sec. 10298, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1632.

Operation and Effect

Under this section regarding allowance of sums paid by administrator without allowance prescribed by statute in settlement of debts justly due, if other condi-

tions of statute have been met, fact of lack of presentation of claim does not prove that debt is not "justly due" and does not affect right and duty of court to approve action of administrator in paying it. In re McKinnon's Estate, — M —, 164 P 2d 726, 727.

References

Cited or applied as sec. 7644, Revised Codes, in State ex rel. Eisenhauer v. District Court, 54 M 172, 175, 168 P 522.

91-3512. (10299) Day of settlement to be appointed and notice thereof. When any account is rendered for settlement, the court or judge may appoint a day for the settlement thereof; the clerk must thereupon give notice thereof by causing notices to be posted in at least three public places in the county, setting forth the name of the estate, the executor or administrator, and the day appointed for the settlement of the account. The court or judge may order such further notice to be given as may be proper.

History: En. Sec. 265, p. 308, L. 1877; re-en. Sec. 265, 2nd Div. Rev. Stat. 1879; re-en. Sec. 265, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2791, C. Civ. Proc. 1895; re-en. Sec. 7645, Rev. C. 1907; re-en. Sec. 10299, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1633.

Operation and Effect

The giving of the notice required by this section is an indispensable requirement, and must be observed, or the order of allowance will not be binding. In re Davis' Estate, 35 M 273, 280, 88 P 957.

Id. The notice required in probate proceedings serves the purpose of a summons in ordinary actions. The giving of the notice in probate proceedings may be rendered unnecessary by the appearance of the parties and their participation in the proceedings. In such case the purpose of the notice has been served, and one who has appeared and taken part in the hearing will not be heard to say that the court had no jurisdiction to determine his rights.

In an action to recover on a guardian's bond, in which defendant surety's conten-

tion was that the decree of settlement of the guardian's account was not binding upon it because it had not received notice of hearing thereon, held, that posted notice given under this section (relating to settlement of accounts of executors and administrators made applicable by section 91-5210 to proceedings in guardianship) was constructive notice to defendant, and that the court's recital in the decree of settlement that notice had been given, was sufficient proof of notice (sec. 93-1001-20). *Oliveri v. Maroncelli et al.*, 94 M 476, 479, 22 P 2d 1054.

91-3513. (10300) When settlement is final, notice must so state—final settlement, partition and distribution. If the account mentioned in the preceding section be for final settlement, and a petition for the final distribution of the estate be filed with said accounts, the notice of the settlement must state those facts, which notice must be given by posting or publication, as the court or judge may direct, and for such time as may be ordered. On the settlement of said account, distribution and partition of the estate to all entitled thereto may be immediately had, without further notice of proceedings.

History: En. Sec. 266, p. 309, L. 1877; re-en. Sec. 266, 2nd Div. Rev. Stat. 1879; re-en. Sec. 266, 2nd Div. Comp. Stat. 1887; amd. Sec. 2792, C. Civ. Proc. 1895; re-en. Sec. 7646, Rev. C. 1907; re-en. Sec. 10300, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1634.

Purpose

The purpose of this section, while relating to settlement of administrator's or executor's account and requiring that the notice must state that the settlement is to be final, made applicable to guardianship proceedings by sec. 91-5210, is to bring all interested parties within the jurisdiction of the court and bind them by the court's orders. *In re Kostohris' Estate*, 96 M 226, 231, 29 P 2d 829.

91-3514. (10301) Interested party may file exceptions to account. On the day appointed, or any subsequent day to which the hearing may be postponed by the court or judge, any person interested in the estate may appear and file his exceptions in writing to the account, and contest the same.

History: En. Sec. 267, p. 309, L. 1877; re-en. Sec. 267, 2nd Div. Rev. Stat. 1879; re-en. Sec. 267, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2793, C. Civ. Proc. 1895; re-en. Sec. 7647, Rev. C. 1907; re-en. Sec. 10301, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1635.

Operation and Effect

A creditor whose claim against an estate may be reduced by the allowance of an alleged debt is a person interested in the estate, and may contest the administrator's final account under this section and section 91-3512. *In re Mouillierat's Estate*, 14 M 245, 251, 36 P 185.

References

Cited or applied as sec. 2791, Code of Civil Procedure, in *In re Tuohy's Estate*, 33 M 230, 246, 83 P 486; as section 7645, Revised Codes, in *State ex rel. Eisenhower v. District Court*, 54 M 172, 175, 168 P 522; *In re Estate of Murphy*, 57 M 273, 279, 188 P 146; *State ex rel. Brophy v. District Court*, 97 M 83, 84, 33 P 2d 266.

Executors and Administrators—505.

34 C.J.S. Executors and Administrators § 899.

References

Cited or applied as sec. 7646, Revised Codes, in *In re Estate of Murphy*, 57 M 273, 280, 188 P 146; *Oliveri v. Maroncelli et al.*, 94 M 476, 479, 22 P 2d 1054; *State ex rel. Brophy v. District Court*, 97 M 83, 84, 33 P 2d 266; *State ex rel. Regis v. District Court*, 102 M 74, 83, 55 P 2d 1295.

Executors and Administrators—472 et seq.

34 C.J.S. Executors and Administrators §§ 837, 844, 848 et seq.

21 Am. Jur. 656, Executors and Administrators, § 491 et seq.

The allowance of an individual claim of an administrator against the estate is not conclusive, but the parties interested may contest it when his account is presented. *In re Barker's Estate*, 26 M 279, 283, 67 P 941.

References

Cited or applied as sec. 7647, Revised Codes, in *State ex rel. Eisenhower v. District Court*, 54 M 172, 175, 168 P 522; *In re Estate of Murphy*, 57 M 273, 279, 188 P 146; *Oliveri v. Maroncelli et al.*, 94 M 476, 479, 22 P 2d 1054.

Executors and Administrators—504.
34 C.J.S. Executors and Administrators
§ 883 et seq.

21 Am. Jur. 665, Executors and Admin-
istrators, § 507.

91-3515. (10302) All matters may be contested by the heirs—hearing.
All matters, including allowed claims not passed upon on the settlement of any former account, or on rendering an exhibit, or on making an order of sale, may be contested by the heirs for cause shown. The hearing and allegations of the respective parties may be postponed from time to time, when necessary, and the court or judge may appoint one or more referees to examine the accounts and make report thereon, subject to confirmation; and may allow a reasonable compensation to the referees, to be paid out of the estate of the decedent.

History: En. Sec. 268, p. 309, L. 1877;
re-en. Sec. 268, 2nd Div. Rev. Stat. 1879;
re-en. Sec. 268, 2nd Div. Comp. Stat. 1887;
re-en. Sec. 2794, C. Civ. Proc. 1895; re-en.
Sec. 7648, Rev. C. 1907; re-en. Sec. 10302,
R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1636.

References

Cited or applied as sec. 7648, Revised
Codes, in *In re Estate of Murphy*, 57 M
273, 279, 188 P 146; *In re Smith's Estate*,
60 M 276, 295, 199 P 696; *In re Harper's*
Estate, 98 M 356, 40 P 2d 51.

91-3516. (10303) Settlement of accounts to be conclusive, when and when not. The settlement of any account and the allowance thereof by the court or judge, or upon appeal, is conclusive against all persons in any way interested in the estate, saving, however, to all persons laboring under any legal disability, the right to move for cause to reopen and examine the account, or to proceed by action against the executor or administrator, either individually or upon his bond, at any time before final distribution; and in any action brought by any such person, the allowance and settlement of the account is prima facie evidence of its correctness; provided, the court may, upon motion of any party interested, or upon its own motion, within sixty days after the rendition of the decree in cases of inadvertence, or within sixty days after the discovery of the facts constituting the fraud, reopen or set aside any decree of any settlement on the grounds of inadvertence or fraud.

History: En. Sec. 269, p. 309, L. 1877;
re-en. Sec. 269, 2nd Div. Rev. Stat. 1879;
re-en. Sec. 269, 2nd Div. Comp. Stat. 1887;
re-en. Sec. 2795, C. Civ. Proc. 1895; re-en.
Sec. 7649, Rev. C. 1907; amd. Sec. 1, Ch.
46, L. 1919; re-en. Sec. 10303, R. C. M.
1921. Cal. C. Civ. Proc. Sec. 1637.

Attack on Special Allowance of Attorney's Fee

A party may be relieved from a judgment or order secured through extrinsic fraud, constructive in character, and upon failure of attorney to advise petitioner of his intention to secure a fee greatly in excess of what he had represented to her it would be, thus preventing her resisting same, held that lower court erred in denying her motion to vacate order, and equity rule to set aside judgment procured through fraud applies on writ of supervisory control. *State ex rel. Clark v. District Court*, 102 M 227, 236, 57 P 2d 809.

Attack on Special Allowance of Executor's Fee

Where an allowance of an executor's fee for extraordinary services was made in a separate order on same day decree of final settlement of account was rendered, the order making the allowance must be considered and read into the decree of settlement, and interested party attacking the special allowance on ground of inadvertence and fraud properly proceeded by motion to correct the decree of settlement under this section. *State ex rel. Regis v. District Court*, 102 M 74, 78, 55 P 2d 1295; *State ex rel. Clark v. District Court*, 102 M 227, 234, 57 P 2d 809.

Burden of Proof on Re-examination of Account

Where a minor asks to have the accounts of the executrix previously approved reopened, the previous settlement is, under this section, prima facie evidence of

the correctness of the account, and the burden rests upon him to prove that a certain item was erroneously allowed and approved. In *re Eakins' Estate*, 64 M 84, 90, 208 P 956.

Court Loses Jurisdiction After Sixty Days

Under this section, the district court sitting in probate may within sixty days after rendition of a decree settling estate accounts reopen or set it aside for inadvertence (or within sixty days after discovery of fraud, not involved in the instant case); if it does not act within that time it loses jurisdiction in that behalf. In *re Sullivan's Estate*, 112 M 496, 503, 118 P 2d 137.

Effect of Fraud

An order settling an executor's account is not binding upon the court in considering his second account filed about a year later, the provision of this section, making settlement conclusive, having no application where the executor has been guilty of fraud. In *re Bradfield's Estate*, 69 M 247, 258, 221 P 531.

The rule that an order approving an administrator's final account is conclusive of all matters involved which might have been disputed at the hearing but were not, has no application in an action by his successor against the sureties on his predecessor's bond to recover property of the estate fraudulently concealed by him, where no one interested in the estate prior to the time he presented his final report knew of the existence of the property or that it belonged to the estate. *Baker v. Hanson et al.*, 72 M 22, 33, 231 P 902.

Insufficient Notice of Settlement of Extraordinary Fees—Nonresident Heir

Where an heir residing in New York had notice for settlement of executor's account, allowance of his statutory fees and final distribution, but none of a petition for allowance of extraordinary fees, notice of latter by posting in Butte, Montana, held insufficient to vest jurisdiction in district court to make order allowing such fees. *State ex rel. Regis v. District Court*, 102 M 74, 80, 55 P 2d 1295.

Minor Reaching Majority Must Show Reason for His Failure to Discover Facts of Fraud

Where a minor heir upon reaching majority petitions for a reopening of a decree of settlement of estate under this section, the previous settlement is *prima facie* proof of the correctness of the executor's account, petitioner having the burden to prove fraud and consequent injury, and also that there was reason for his failure to discover the facts, and failing to prove

the latter, he will be presumed to have known what he might have discovered with reasonable diligence. *Montgomery v. Gilbert*, 111 M 250, 273, 108 P 2d 616.

Motion to Reopen Matter—Dismissal of Motion Without Hearing — Mandamus Proper Remedy

Held, on application for writ of mandate, that where a party interested in an estate after rendition of final decree of settlement of an administrator's account, within the time allowed by this section, moved to reopen the matter for the purpose of having set aside a portion of the decree fixing fees for alleged inadvertence, the court, in dismissing the motion without hearing on the merits on the ground that the matter was *res judicata* deprived the moving party of his day in court granted him by this section, and thus refused to perform a duty imposed upon it by law. *State ex rel. Brophy v. District Court*, 95 M 479, 482, 27 P 2d 509.

Id. Contention of respondent district judge, whom relator sought to compel by writ of mandate to take jurisdiction of a motion to reopen an estate matter under authority of this section, on the ground that the court through inadvertence had included improper items of expense in the order settling an administrator's account, that before taking jurisdiction it had the right to dispose of the question whether in fact there was any inadvertence in doing what it had done, held without merit.

Motion to Set Aside Decree of Final Settlement on Ground of Inadvertence—Sufficiency of Evidence

After entry of decree of final settlement of the account of an administratrix and distribution of an estate, the beneficiary filed a motion to set aside that portion of the decree awarding administratrix and counsel fees, on the ground that the items had been allowed inadvertently, and, the motion being denied, the movant sought review of the action of the court by writ of supervisory control. Held, after a review of the evidence heard on the motion, that the finding of the trial court that in entering the decree it did not act through inadvertence, i.e., through a want of care, inattention, carelessness, negligence or oversight, may not be disturbed. *State ex rel. Brophy v. District Court*, 97 M 83, 84, 33 P 2d 266.

Not Applicable to Guardians' Accounts

Section 91-5013 provides that all the proceedings as to accounting, and the settlement of accounts of guardians, must be had and made as required concerning estates of deceased persons; but this does not make this section, as to the conclusive-

ness of the settlement of administrators' accounts applicable to guardians' accounts. The code does not in terms provide that the settlement of a guardians' intermediate account shall be conclusive. It may, therefore, be said to be merely *prima facie* evidence of its correctness, subject to be inquired into. In *re Kostohris' Estate*, 96 M 226, 234, 29 P 2d 829.

Presumption of Verity Overcome by Record

The fact that order recited that due and legal notice of hearing resulting in allowance of extraordinary fees had been given, did not foreclose consideration of question of notice where the record disclosed that proper notice had not been given, on application for writ of supervisory control. *State ex rel. Regis v. District Court*, 102 M 74, 84, 55 P 2d 1295.

Remedy by Supervisory Control Proper

An allowance made by district court to executor for extraordinary services as the result of inadvertence or induced by fraud, may be reached by supreme court in the exercise of its supervisory control over inferior courts, otherwise only by appeal. *State ex rel. Regis v. District Court*, 102 M 74, 79, 55 P 2d 1295.

Section Fixing Time for Minor to Bring Action

Section 91-3037 fixes the time for a minor to bring action for relief under sec. 91-3036, at any time within three years after removal of his disability. *Montgomery v. Gilbert*, 111 M 250, 273, 108 P 2d 616.

What May Constitute "Inadvertence"

When district court order setting aside order allowing executor's fee for extraordinary services did not specifically specify ground of inadvertence but did find non-resident heir not notified of the application for the fee, it will be held that the order was "inadvertently" made, i.e., that the fact of absence of notice was overlooked. *State ex rel. Regis v. District Court*, 102 M 74, 79, 55 P 2d 1295.

"Inadvertence" within the meaning of this section means "a want of care, inattention, carelessness, negligence or oversight." *State ex rel. Clark v. District Court*, 102 M 227, 234, 57 P 2d 809.

When Order Settling Accounts Is Conclusive

Where the account of an administratrix has been settled, and it has been adjudged that the estate is indebted to her for moneys advanced by her for the benefit of the estate, the order of court settling such account is, in the absence of an affirmative showing on the face of the

claims for money so advanced, conclusive, both on the estate and on all persons interested therein, who, at the time of settlement, were not laboring under any legal disability. In *re Williams' Estate*, 47 M 325, 330, 132 P 421.

An heir who permitted the will of his father to be probated without contest, accounts of the executor settled and allowed, and partial distribution of the assets made without timely objection or appeal, was foreclosed from attacking such proceedings on appeal from an order settling the final account of the executor and making final distribution. In *re Estate of Murphy*, 57 M 273, 188 P 146.

Under this section, an order of the district court settling and allowing the accounts of an administrator or executor is conclusive upon the estate and all persons interested therein not laboring under any legal disability, in the absence of an affirmative showing on the face thereof that claims embraced therein are illegal. In *re McLure's Estate*, 90 M 502, 510, 3 P 2d 1056.

Where No Appeals Lie

The only appeals permissible in probate matters are those provided in subd. 3 of sec. 93-8003, and no mention being made there of an appeal from an order refusing to vacate a decree of settlement of final account and distribution of estate, no appeal lies therefrom; that the provision for appeal from an order made after judgment does not apply to probate; as a corollary it would seem no appeal lies from an order vacating such decree, or a part thereof. *State ex rel. Regis v. District Court*, 102 M 74, 76, 55 P 2d 1295.

When Fraud Must Have Occurred

Any fraud relied upon in proceedings based on this section must be fraud occurring before the settlement of the final account and the court properly struck allegations of the petition to set aside the settlement relating to transactions or events after settlement of the final account. In *re Armesworthey's Estate*, 117 M 602, 606, 160 P 2d 472.

References

Cited or applied as sec. 2795, Code of Civil Procedure, before amendment, in *In re Dougherty's Estate*, 34 M 336, 344, 86 P 38; as sec. 7649, Revised Codes, before amendment, in *State ex rel. Eisenhower v. District Court*, 54 M 172, 175, 168 P 522; *Oliveri v. Maroncelli et al.*, 94 M 476, 479, 22 P 2d 1054; In *re Kostohris' Estate*, 96 M 226, 233, 29 P 2d 829; In *re Astibia's Estate*, 100 M 224, 234, 46 P 2d 712; *Montgomery v. First National Bank of Dillon*, 114 M 395, 413, 136 P 2d 760.

Executors and Administrators—513, 514.
34 C.J.S. Executors and Administrators
§ 910.

Right of surety on bond of executor, administrator, or testamentary trustee, as regards notice of proceedings to settle

principal's account or reopen settlement.
93 ALR 1366.

Settlement of account of executor, administrator, trustee or guardian as precluding attack upon transaction involving self-dealing. 137 ALR 558.

91-3517. (10304) Proof of notice of settlement of accounts. The account must not be allowed by the court or judge until it is first proved that notice has been given as required by this chapter, and the order must show that such proof was made to the satisfaction of the court or judge, and is conclusive evidence of the fact.

History: En. Sec. 270, p. 310, L. 1877; re-en. Sec. 270, 2nd Div. Rev. Stat. 1879; re-en. Sec. 270, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2796, C. Civ. Proc. 1895; re-en. Sec. 7650, Rev. C. 1907; re-en. Sec. 10304, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1638.

Operation and Effect

Where the record on appeal from an order allowing an administrator's annual account did not show any proof of notice of the hearing, the finding of the court

that such notice had been given was sufficient to meet the requirements of this section. In re Davis' Estate, 35 M 273, 280, 88 P 957.

References

Oliveri v. Maroncelli et al., 94 M 476, 479, 22 P 2d 1054.

Executors and Administrators—507, 508.
34 C.J.S. Executors and Administrators
§ 890 et seq.

91-3518. (10305) Sale of personal property in lieu of realty—when ordered. Whenever it appears to the court or judge on any hearing of an application for the sale of real property, that it would be for the interest of the estate that personal property of the estate, or some part of such property, should be first sold, the court or judge may order the sale of such personal property, or any part of it, and the sale thereof shall be conducted in the same manner as if the application had been made for the sale of such personal property in the first instance.

History: En. Sec. 271, p. 310, L. 1877; re-en. Sec. 271, 2nd Div. Rev. Stat. 1879; re-en. Sec. 271, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2797, C. Civ. Proc. 1895; re-en. Sec. 7651, Rev. C. 1907; re-en. Sec. 10305, R. C. M. 1921.

References

Cited or applied as sec. 7651, Revised

Codes, in Plains Land & Improvement Co. v. Lynch, 38 M 271, 283, 99 P 847.

Executors and Administrators—343-346.
34 C.J.S. Executors and Administrators
§§ 568, 572, 575, 576, 581, 582.

21 Am. Jur. 695-697, Executors and Administrators, §§ 561-564.

91-3519. (10306) Moneys invested by order of court. Pending the settlement of any estate, on the petition of the executor, administrator, or any one or more of the heirs, legatees, or devisees, the court or judge may order any moneys in the hands of any executor or administrator to be loaned, for such length of time as may be requested by the party petitioning, and the court or judge may think to the interests of the estate; and on such security as the court or judge thereof may approve of, which shall not be a period of time to exceed one year at any one time; but no money shall be loaned, except on United States, state, county, or approved municipal bonds or real estate mortgage (and then only to the extent of one-half of the market value of the real estate so loaned upon the value of said property, to be estimated by the judge). The term "real estate," as herein used, does not include mining property. Such order can only be made after notice in the manner prescribed by the court or judge.

History: En. Sec. 272, p. 310, L. 1877; re-en. Sec. 272, 2nd Div. Rev. Stat. 1879; re-en. Sec. 272, 2nd Div. Comp. Stat. 1887; amd. Sec. 1, p. 145, L. 1889; amd. Sec. 2798, C. Civ. Proc. 1895; re-en. Sec. 7652, Rev. C. 1907; re-en. Sec. 10306, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1640.

Effect of Loaning Estate Funds Without Approval of Court

An executor or administrator who makes loans of estate funds without authority of court (this section) does so at the peril of being held liable for losses sustained by the estate; whereas if the course prescribed by the statute is pursued he will be relieved of liability upon a showing that the loss was not occasioned by his own fault. In *re Connolly's Estate*, 73 M 35, 43 et seq., 235 P 408.

Making Loans Under Power of the Will

A provision of a will authorizing an executor to make real estate loans and to pay the interest therefrom to a named legatee during the remainder of her life did not deprive the probate court of jurisdiction to compel the executor to exercise good faith and good judgment in making loans nor authorize him to unduly prolong the settlement of the estate. In *re Bradfield's Estate*, 69 M 247, 258, 221 P 531.

Not Applicable to Guardianship Matters

Counsel for the government and the present guardian contend that, as this section specifies that money shall be loaned only on real estate security, or certain public securities, these loans could not have been authorized by the court. That section, however, has to do only with loans from the funds of decedents' estates and deals with substantive law, rather than a matter of procedure, so that, as above noted, the section is not made applicable to guardianship matters. In *re Kostohris' Estate*, 96 M 226, 240, 29 P 2d 829.

Not Applicable to Investments of Estate Funds by Testamentary Trustees

The provisions of this section that pending settlement of an estate the district court may order any moneys in the hands of the executors or administrators to be loaned for not to exceed one year, in United States, state, county, approved

municipal bonds or real estate mortgages only, held to have no application to investments made by testamentary trustees in charge of closed estates of which distribution has been made, such trustees not being named therein and the provision being unworkable in such cases. In *re Harper's Estate*, 98 M 356, 363, 40 P 2d 51.

Operation in General

An administrator is not chargeable with interest on money of an estate, pending an appeal and the delay incident thereto, where it does not appear that he was culpable in any respect. In *re Davis' Estate*, 35 M 273, 286, 88 P 957.

Numerous sections of the code, relating to probate matters, show a clear purpose to place in the hands of the court authority sufficient to secure a just administration of the estate, to the end that the creditors may be protected and the heirs receive the largest amount of the property compatible with an economical but complete administration of the estate. *State ex rel. King v. District Court*, 42 M 182, 185, 111 P 717.

Special Administrator Has No Power to Loan Funds

A special administrator has no power to loan the funds of the estate in his charge, and therefore cannot be held to pay interest for failing to loan them. If he receives profits from the funds of the estate in his keeping, such profits belong to the heirs, and must be included in his final account. In *re Williams' Estate*, 55 M 63, 67, 70, 173 P 790.

Id. Since a special administrator cannot lawfully invest, loan, or use funds which come into his hands by virtue of his office, the only theory upon which he can be held to account for profits accruing upon them is that he made an unlawful use of them.

References

Cited or applied as sec. 7652, Revised Codes, in *State ex rel. Eisenhower v. District Court*, 54 M 172, 175, 168 P 522.

Executors and Administrators—102.

33 C.J.S. Executors and Administrators §§ 205, 206.

21 Am. Jur. 526, Executors and Administrators, §§ 264 et seq.

CHAPTER 36

DEBTS OF THE ESTATE—PAYMENT OF

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| Section | 91-3601. | Order of payment of debts. |
| | 91-3602. | Where property insufficient to pay mortgage. |
| | 91-3603. | Estate insufficient, a dividend to be paid. |
| | 91-3604. | Funeral expenses, expenses of last sickness and family allowance. |

- 91-3605. Order for payment of debts and discharge of the executor or administrator.
- 91-3606. Provision for disputed and contingent claims.
- 91-3607. After order for payment of debts, executor or administrator personally liable to creditors.
- 91-3608. Claims not included in order for payment of debts—how disposed of.
- 91-3609. Order for payment of legacies and distribution of estate.
- 91-3610. Final account—when to be made.
- 91-3611. Neglect to render final account—how treated.

91-3601. (10307) Order of payment of debts. The debts of the estate subject to the provisions of section 45-603, must be paid in the following order:

1. Funeral expenses not to exceed two hundred dollars (\$200.00);
2. The expenses of the last sickness not to exceed five hundred dollars (\$500.00);
3. Debts having preference by the laws of the United States or of the state;
4. Judgments rendered against the decedent in his life-time, constituting a lien on property of the estate, and mortgages in the order of their date, provided the amount of such preference shall not exceed the value of said property subject to such lien;
5. All other demands against the estate, including funeral expenses in excess of two hundred dollars (\$200.00) and expenses of the last sickness in excess of five hundred dollars (\$500.00).

History: En. Sec. 273, p. 310, L. 1877; re-en. Sec. 273, 2nd Div. Rev. Stat. 1879; re-en. Sec. 273, 2nd Div. Comp. Stat. 1887; amd. Sec. 2810, C. Civ. Proc. 1895; re-en. Sec. 7653, Rev. C. 1907; re-en. Sec. 10307, R. C. M. 1921; amd. Sec. 1, Ch. 141, L. 1933. Cal. C. Civ. Proc. Sec. 1643.

Cross-Reference

Wages as preferred claim against employer's estate, sec. 45-603.

Operation and Effect

An administrator, upon a sale by him of a chattel belonging to the estate and mortgaged by the decedent, must apply the proceeds to the payment of the mortgaged debt, before he can use any thereof in payment of expenses of administration. *Horsfall Estate v. Royles*, 20 M 495, 496, 52 P 198.

A guardian appointed for an incompetent, who was indebted to his attorney for fees at the time of such appointment, could not pay such attorney the fees claimed to be due out of the funds of the incompetent's estate until such claim had

been allowed by the court. *State ex rel. Davis v. District Court*, 30 M 8, 11, 75 P 516.

Quaere: Does this section, providing for the payment of all debts of an estate and specifying the order of payment (heretofore held not controlling as to payment of debts secured by mortgage) control as to a debt secured by pledge? In *re Stevenson*, 87 M 486, 494 et seq., 289 P 566.

References

Nathan v. Freeman et al., 70 M 259, 267, 225 P 1015; In *re Jennings' Estate*, 74 M 449, 458, 241 P 648; *State v. Yellowstone Bank etc. Co.*, 75 M 43, 50, 243 P 813; *Leffek v. Luedeman*, 95 M 457, 469, 27 P 2d 511; In *re Bielenberg's Estate*, 98 M 546, 40 P 2d 49; *Erwin v. Mark*, 105 M 361, 373, 73 P 2d 537; *Gaer v. Bank of Baker*, 111 M 204, 209, 107 P 2d 877.

Executors and Administrators—260-268.
34 C.J.S. Executors and Administrators §§ 459-465, 468.

21 Am. Jur. 602, Executors and Administrators, §§ 389 et seq.

91-3602. (10308) Where property insufficient to pay mortgage. The preference given in the preceding section to a mortgage only extends to the proceeds of the property mortgaged. If the proceeds of such property are insufficient to pay the mortgage, the part remaining unsatisfied must be classed with the other demands against the estate.

History: En. Sec. 274, p. 311, L. 1877; re-en. Sec. 274, 2nd Div. Rev. Stat. 1879; re-en. Sec. 2811, C. Civ. Proc. 1895; re-en.

Sec. 7654, Rev. C. 1907; re-en. Sec. 10308,
R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1644.

References

Cited or applied as sec. 2811, Code of
Civil Procedure, in *Horsfall Estate v.*
Royles, 20 M 495, 497, 52 P 198.

91-3603. (10309) Estate insufficient, a dividend to be paid. If the estate is insufficient to pay all the debts of any one class, each creditor must be paid a dividend in proportion to his claim, and no creditor of any one class shall receive any payment until all those of the preceding class are fully paid.

History: En. Sec. 275, p. 311, L. 1877;
re-en. Sec. 275, 2nd Div. Rev. Stat. 1879;
re-en. Sec. 275, 2nd Div. Comp. Stat. 1887;
re-en. Sec. 2812, C. Civ. Proc. 1895; re-en.
Sec. 7655, Rev. C. 1907; re-en. Sec. 10309,
R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1645.

References

State v. Yellowstone Bank etc. Co., 75
M 43, 50, 243 P 813; *Leffek v. Luedeman*,
95 M 457, 469, 27 P 2d 511; *Erwin v. Mark*,
105 M 361, 373, 73 P 2d 537.

91-3604. (10310) Funeral expenses, expenses of last sickness and family allowance. The executor or administrator, as soon as he has sufficient funds in his hands, may pay the funeral expenses and the expenses of the last sickness, and the allowance made to the family of the decedent. He may retain in his hands the necessary expenses of administration, but he is not obliged to pay any debt or any legacy until, as prescribed in this chapter, the payment has been ordered by the court or judge.

History: En. Sec. 276, p. 311, L. 1877;
re-en. Sec. 276, 2nd Div. Rev. Stat. 1879;
re-en. Sec. 276, 2nd Div. Comp. Stat. 1887;
amd. Sec. 2813, C. Civ. Proc. 1895; re-en.
Sec. 7656, Rev. C. 1907; re-en. Sec. 10310,
R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1646.

P 2d 49; *Gaer v. Bank of Baker*, 111 M
204, 209, 107 P 2d 877.

Executors and Administrators 182, 277
et seq., 296.

34 C.J.S. *Executors and Administrators*
§§ 338, 466 et seq., 487.

21 Am. Jur. 607, *Executors and Admin-
istrators*, §§ 394 et seq.

References

In re *Bielenberg's Estate*, 98 M 546, 40

91-3605. (10311) Order for payment of debts and discharge of the executor or administrator. Upon the settlement of the accounts of the executor or administrator, as required in this chapter, the court or judge must make an order for the payment of the debts, as circumstances of the estate require. If there are not sufficient funds in the hands of the executor or administrator, the court or judge must specify in the order the sum to be paid to each creditor. If the whole property of the estate be exhausted by such payment or distribution, such account must be considered as a final account, and the executor or administrator is entitled to his discharge on producing and filing the necessary vouchers and proofs, showing that such payments have been made, and that he has fully complied with the order of the court or judge.

History: En. Sec. 277, p. 311, L. 1877;
re-en. Sec. 277, 2nd Div. Rev. Stat. 1879;
re-en. Sec. 277, 2nd Div. Comp. Stat. 1887;
amd. Sec. 2814, C. Civ. Proc. 1895; re-en.
Sec. 7657, Rev. C. 1907; re-en. Sec. 10311,
R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1647.

References

Leffek v. Luedeman, 95 M 457, 469, 27
P 2d 511; *Hulburd v. Commissioner of In-
ternal Revenue*, 296 U. S. 300, 311, 80 L.
Ed. 242.

91-3606. (10312) Provision for disputed and contingent claims. If there is any claim not due, or any contingent or disputed claim against the estate, the amount thereof, or such part of the same as the holder would be entitled

to if the claim were due, established, or absolute, must be paid into the court, and there remain, to be paid over to the party when he becomes entitled thereto; or, if he fails to establish his claim, to be paid over or distributed as the circumstances of the estate require. If any creditor whose claim has been allowed, but is not yet due, appears and assents to a deduction therefrom of the legal interest for the time the claim has yet to run, he is entitled to be paid accordingly. The payments provided for in this section are not to be made when the estate is insolvent, unless a pro rata distribution is ordered.

History: En. Sec. 278, p. 312, L. 1877; re-en. Sec. 278, 2nd Div. Rev. Stat. 1879; re-en. Sec. 278, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2815, C. Civ. Proc. 1895; re-en. Sec. 7658, Rev. C. 1907; re-en. Sec. 10312, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1648.

91-3607. (10313) After order for payment of debts, executor or administrator personally liable to creditors. When an order is made by the court or judge for the payment of creditors, the executor or administrator is personally liable to each creditor for his allowed claim, or the dividend thereon, and execution may be issued on such order as upon a judgment in the court, in favor of each creditor, and the same proceedings may be had under such execution as under execution in other cases. The executor or administrator is liable therefor on his bond to each creditor.

History: En. Sec. 279, p. 312, L. 1877; re-en. Sec. 279, 2nd Div. Rev. Stat. 1879; re-en. Sec. 279, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2816, C. Civ. Proc. 1895; re-en. Sec. 7659, Rev. C. 1907; re-en. Sec. 10313, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1649.

91-3608. (10314) Claims not included in order for payment of debts—how disposed of. When the accounts of the administrator or executor have been settled, and an order made for the payment of debts and distribution of the estate, no creditor, whose claim was not included in the order for payment, has any right to call upon the creditors who have been paid, or upon the heirs, devisees, or legatees, to contribute to the payment of his claim; but if the executor or administrator has failed to give the notice to the creditors, as prescribed in section 91-2702, such creditor may recover on the bond of the executor or administrator the amount of his claim, or such part thereof as he would have been entitled to, had it been allowed. This section shall not apply to any creditor whose claim was not due ten months before the day of settlement, or whose claim was contingent, and did not become absolute ten months before such day.

History: En. Sec. 280, p. 312, L. 1877; re-en. Sec. 280, 2nd Div. Rev. Stat. 1879; re-en. Sec. 280, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2817, C. Civ. Proc. 1895; re-en. Sec. 7660, Rev. C. 1907; re-en. Sec. 10314, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1650.

91-3609. (10315) Order for payment of legacies and distribution of estate. If the whole of the debts have been paid by the first distribution, the court or judge must direct the payment of legacies and the distribution of the estate among the heirs, legatees, or other persons entitled, as provided in the next chapter; but if there be debts remaining unpaid, or if, for other reasons, the estate be not in a proper condition to be closed, the court or judge must give such extension of time as may be reasonable for the final settlement of the estate.

History: En. Sec. 281, p. 312, L. 1877; re-en. Sec. 281, 2nd Div. Rev. Stat. 1879; re-en. Sec. 281, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2818, C. Civ. Proc. 1895; re-en. Sec. 7661, Rev. C. 1907; re-en. Sec. 10315, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1651.

Operation and Effect

The final account of an administrator or executor cannot be settled or approved so long as there are outstanding claims against the estate which have not been paid, if there is any property in the hands of the representative that is available for the payment of such claims, in whole or in part. In *re Williams' Estate*, 47 M 325, 329, 331, 132 P 421.

Id. It is error for the district court to settle and approve the final account of an administrator, where it appears that claims against the estate for advancements made

for its benefit, though properly allowed, are unpaid, and where there is no showing that all property available for their payment has been exhausted.

References

Mathey v. Mathey, 109 M 467, 473, 98 P 2d 373.

Executors and Administrators \Rightarrow 283, 315.
34 C.J.S. Executors and Administrators
§§ 473, 525 et seq.
21 Am. Jur. 625, Executors and Administrators, §§ 427 et seq.

91-3610. (10316) Final account—when to be made. At the time designated in the last section, or sooner, if within that time all the property of the estate has been sold, or there are sufficient funds in his hands for the payment of all the debts due by the estate, and the estate be in a proper condition to be closed, the executor or administrator must render a final account, and pray a settlement of his administration.

History: En. Sec. 282, p. 313, L. 1877; re-en. Sec. 282, 2nd Div. Rev. Stat. 1879; re-en. Sec. 282, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2819, C. Civ. Proc. 1895; re-en. Sec. 7662, Rev. C. 1907; re-en. Sec. 10316, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1652.

Codes, in *In re Williams' Estate*, 47 M 325, 329, 132 P 421; *Mathey v. Mathey*, 109 M 467, 473, 98 P 2d 373.

References

Cited or applied as sec. 7662, Revised

Executors and Administrators \Rightarrow 459.
34 C.J.S. Executors and Administrators
§ 829.
21 Am. Jur. 656, Executors and Administrators, §§ 491 et seq.

91-3611. (10317) Neglect to render final account—how treated. If he neglects to render his account, the same proceedings may be had as prescribed in regard to the first account to be rendered by him, and all the provisions relative to the last-mentioned account, and the notice and settlement thereof, apply to his account presented for final settlement.

History: En. Sec. 283, p. 313, L. 1877; re-en. Sec. 283, 2nd Div. Rev. Stat. 1879; re-en. Sec. 283, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2820, C. Civ. Proc. 1895; re-en. Sec. 7663, Rev. C. 1907; re-en. Sec. 10317, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1653.

Executors and Administrators \Rightarrow 467.
34 C.J.S. Executors and Administrators
§ 835.

CHAPTER 37**PARTIAL DISTRIBUTION PRIOR TO FINAL SETTLEMENT OF ESTATE**

- Section 91-3701. Payment to distributees upon giving bonds.
91-3702. Notice of application.
91-3703. Executor or other person may resist application.
91-3704. Order prayed for to require bond, which must be given—may order whole or part of share to be delivered—where partition is necessary, how made—costs.
91-3705. Order for payment of part of money secured by bond and suit thereon.
91-3706. Application for distribution.

91-3701. (10318) Payment to distributees upon giving bonds. At any time after the lapse of four months from the issuing of letters testamentary or of administration, any heir, devisee, or legatee may present his petition to the court or judge for the legacy or share of the estate to which he is

entitled, to be given to him upon his giving bonds, with security, for the payment of his proportion of the debts of the estate.

History: En. Sec. 284, p. 313, L. 1877; re-en. Sec. 284, 2nd Div. Rev. Stat. 1879; re-en. Sec. 284, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2830, C. Civ. Proc. 1895; re-en. Sec. 7664, Rev. C. 1907; re-en. Sec. 10318, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1658.

Operation and Effect

While an executor (or administrator) may resist an application for partial distribution, in the absence of statute permitting him to petition for such distribution, he has no right to do so, the right to so petition being only conferred upon heirs, devisees and legatees by this section and section 91-3706, and the court was therefore without jurisdiction to entertain his petition. *In re Fratt's Estate*, 60 M 526, 534, 199 P 711.

Title to property of a testator vests in the devisees from the moment of his death, subject to right of the executor to possession for purposes of administration;

therefore, where no portion of the property was necessary for payment of expenses of administration or debts of the estate, the devisees were entitled to possession at the time they executed a mortgage on the property, and the executor was in no position to complain of the decree of foreclosure. *First State Bank v. Mussigbrod et al.*, 83 M 68, 85, 271 P 695.

References

Cited or applied as sec. 284, Second Division Compiled Statutes 1887, in *In re Phillips' Estate*, 18 M 311, 45 P 222; as sec. 2830, Code of Civil Procedure, in *In re Davis' Estate*, 27 M 235, 240, 70 P 721; *Mathey v. Mathey*, 109 M 467, 473, 98 P 2d 373; *State ex rel. Hills v. District Court*, ___ M ___, 169 P 2d 556, 559.

21 Am. Jur. 633, Executors and Administrators, §§ 448, 449.

91-3702. (10319) Notice of application. Notice of the application must be given to the executor or administrator personally, and to all persons interested in the estate in the same manner that notice is required to be given of the settlement of the account of an executor or administrator under the provisions of section 91-3512.

History: En. Sec. 285, p. 313, L. 1877; re-en. Sec. 285, 2nd Div. Rev. Stat. 1879; re-en. Sec. 285, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2831, C. Civ. Proc. 1895; re-en. Sec. 7665, Rev. C. 1907; re-en. Sec. 10319, R. C. M. 1921; amd. Sec. 1, Ch. 2, L. 1947. Cal. C. Civ. Proc. Sec. 1659.

References

Cited or applied as sec. 285, Second Division Compiled Statutes 1887, in *In re Phillips' Estate*, 18 M 311, 45 P 222.

91-3703. (10320) Executor or other person may resist application. The executor or administrator, or any person interested in the estate, may appear at the time named and resist the application, or any other heir, devisee, or legatee may make a similar application for himself.

History: En. Sec. 286, p. 313, L. 1877; re-en. Sec. 286, 2nd Div. Rev. Stat. 1879; re-en. Sec. 286, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2832, C. Civ. Proc. 1895; re-en. Sec. 7666, Rev. C. 1907; re-en. Sec. 10320, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1660.

References

Cited or applied as sec. 2832, Code of Civil Procedure, in *State ex rel. Leyson v. District Court*, 26 M 378, 379, 68 P 411; *In re Davis' Estate*, 27 M 235, 240, 70 P 721.

91-3704. (10321) Order prayed for to require bond, which must be given—may order whole or part of share to be delivered—where partition is necessary, how made—costs. If, at the hearing, it appear that the estate is but little indebted, and that the share of the party applying may be allowed to him without loss to the creditors of the estate, the court or judge must make an order in conformity with the prayer of the applicant, requiring:

1. Each heir, legatee, or devisee obtaining such order, before receiving his share, or any portion thereof, to execute and deliver to the executor

or administrator a bond, in such sum as shall be designated by the court or judge, with sureties to be approved by the judge, payable to the executor or administrator, and conditioned for the payment, whenever required, of his proportion of the debts due from the estate, not exceeding the value or amount of the legacy or portion of the estate to which he is entitled;

2. The executor or administrator to deliver to the heir, legatee, or devisee, the whole portion of the estate to which he may be entitled, or only a part thereof, designating it. If, in the execution of the order, a partition is necessary between two or more of the parties interested, it must be made in the manner hereinafter prescribed. The costs of these proceedings shall be paid by the applicant, or if there be more than one, shall be apportioned equally among them.

History: En. Sec. 287, p. 314, L. 1877; re-en. Sec. 287, 2nd Div. Rev. Stat. 1879; re-en. Sec. 287, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2833, C. Civ. Proc. 1895; re-en. Sec. 7667, Rev. C. 1907; re-en. Sec. 10321, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1661.

Setting Aside Decree of Partial Distribution

Plaintiff, in two causes of action, sought first that the extent of his interest and judgment lien be adjudged, and second to have set aside a decree of partial distribution covering the property involved in both causes of action. The principal de-

fendant acting as executor of the estate of the former owner, moved to strike on the ground that matters relating to distribution were not pleaded in the very words of the probate court. Held, there being no rule of law requiring such procedure, ultimate facts could be set out rather than copying the proceedings in *haec verba*. *Christie v. Morris*, 116 M 210, 216, 149 P 2d 250.

References

Cited or applied as sec. 2833, Code of Civil Procedure, in *In re Davis' Estate*, 27 M 235, 240, 70 P 721.

91-3705. (10322) Order for payment of part of money secured by bond and suit thereon. When any bond has been executed and delivered, under the provisions of the preceding section, and it is necessary for the settlement of the estate to require the payment of any part of the money thereby secured, the executor or administrator must petition the court or judge for an order requiring the payment, and have a citation issued and served on the party bound, requiring him to appear and show cause why the order should not be made. At the hearing, the court or judge, if satisfied of the necessity of such payment, must make an order accordingly, designating the amount and giving a time within which it must be paid. If the money is not paid within the time allowed, an action may be maintained by the executor or administrator on the bond.

History: En. Sec. 288, p. 314, L. 1877; re-en. Sec. 288, 2nd Div. Rev. Stat. 1879; re-en. Sec. 288, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2834, C. Civ. Proc. 1895; re-en. Sec. 7668, Rev. C. 1907; re-en. Sec. 10322, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1662.

Executors and Administrators—299, 318.
34 C.J.S. Executors and Administrators
§§ 490, 498, 511, 512.

91-3706. (10323) Application for distribution. At any time after the lapse of one year from the issuance of letters testamentary or of administration, any heir, devisee, or legatee may present his or her petition to the court or judge for the distribution of the net proceeds of the share of the said estate to which he or she will be entitled. Notice of the application must be given, as required by section 91-3702. The executor or administrator, or any other person interested in the estate, may appear at the time named and resist the application, or any other heir, devisee, or legatee may make

a similar application for himself. If, at the hearing, it appears that the estate is but little indebted, and that the share of the party applying may be allowed to him without loss to the creditors of the estate, the court or judge must make an order in conformity with the prayer of the applicant, requiring:

1. Each heir, devisee, or legatee, obtaining such order, before receiving his share, or any portion thereof, to execute and deliver to the executor or administrator a bond, in such sum as shall be designated by the court or judge, with sureties to be approved by the judge, payable to the executor or administrator, and conditioned for the payment, whenever required, of his proportion of the debts due from the estate, not exceeding the amount or portion of the proceeds of the estate which he has received; provided, that where the time for filing or presenting claims has expired, and all claims that have been allowed have been paid, or are secured by mortgage upon real estate sufficient to pay them, and the court or judge is satisfied that no injury can result to the estate, the court or judge may dispense with the bond.

2. The executor or administrator to deliver to the heir, legatee, or devisee the proceeds of the estate to which he may be entitled, or only a part thereof, designating it. If, in the opinion of the court or judge, it be necessary, in order to ascertain the proceeds that any or all of the heirs, legatees, or devisees may be entitled to, that the interest of any heir, legatee, or devisee in one or more pieces or parcels of property of the estate shall be determined or ascertained, the court or judge may suspend proceedings and direct the petitioner or petitioners to take proceedings under section 91-3801 to ascertain the interest the petitioner or petitioners will have under the will in any piece or parcel of property. The order must describe the property in relation to which proceedings are to be taken. Whenever any bond has been executed and delivered, proceedings upon any such bond may be taken under section 91-3705. The cost of these proceedings shall be paid by the applicant, or if there be more than one, shall be apportioned equally between them.

History: En. Sec. 2835, C. Civ. Proc. 1895; re-en. Sec. 7669, Rev. C. 1907; re-en. Sec. 10323, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1663.

Effect of Assignment on Right to Object

Where a distributee has assigned his share, and the assignment has been recognized by the court, and is not disputed by the assignor, neither the administrator nor another distributee is interested or has a right to object to such share being paid to such assignee. In *re Davis' Estate*, 27 M 490, 497, 71 P 757.

Effect of Settlement by Agreement

Where a contest of a will was settled by agreement of the parties, and a decree entered affirming such agreement, and fixing the shares of the estate to which the parties were entitled as agreed, such decree became the basis of administration as to the devolution of the property, and such

parties and their assigns, though not heirs or legatees named in the will, had a right to petition for a partial distribution of the estate. In *re Davis' Estate*, 27 M 490, 497, 71 P 757.

Executor or Administrator May Not Petition for Partial Distribution

While an executor (or administrator) may resist an application for partial distribution, in the absence of statute permitting him to petition for such distribution, he has no right to do so, the right to so petition being only conferred upon heirs, devisees and legatees by sec. 91-3701 and this section, and the court was therefore without jurisdiction to entertain his petition. In *re Fratt's Estate*, 60 M 526, 534, 539, 199 P 711.

Failure to Serve Nonappearing Devisees

Under this section and sec. 91-3901, relative to distribution of estates, failure of

petitioners to serve nonappearing devisees with process does not deprive the court of jurisdiction to make the order of distribution, it being presumed, in the absence of any showing to the contrary, that the notice required by sec. 91-3904 to be given by posting or publication was caused to be given by the court or judge. In re McGovern's Estate, 77 M 182, 203, 250 P 812.

Heirship Not Determinable Under This Section

In a proceeding under this section for partial distribution of an estate, the questions of heirship, amount of distributive estate claimed, etc., cannot be considered. Those questions are to be determined under the express authority of sec. 91-3803. In re Fleming's Estate, 38 M 57, 59, 98 P 648.

Right to Appeal From Order

The right of the administrator, and of an heir of a beneficiary under the decedent's will, to appeal from a decree granting a distribution of the estate, in proceedings under this section, in which proceedings the administrator and heir both appeared in opposition thereto, will not be determined on a motion to dismiss the appeals, based on the theory that they are not aggrieved by the decree. In re Davis' Estate, 27 M 235, 240, 70 P 721.

Id. Where the facts alleged in the petition for an order of distribution of an

estate were admitted by defendants, this fact was a sufficient reason for an affirmance of the order, but not for a dismissal of the appeal.

Right to Move for a New Trial

The parties opposing the granting of a decree for a distribution of the estate of a decedent under this section may make a motion for a new trial where the decree directs the distribution. In re Davis' Estate, 27 M 235, 241, 70 P 721.

Scope of Section in General

This section is susceptible of but one meaning, namely, that any heir, devisee, or legatee shown by the record to be such, and concerning whose right to inherit there is no question raised, may ask for distribution to him of the share of the estate which the record shows he is entitled to receive, and about which there is no controversy. In re Fleming's Estate, 38 M 57, 61, 98 P 648.

References

Cited or applied as sec. 2835, Code of Civil Procedure, in State ex rel. Pauwelyn v. District Court, 34 M 345, 346, 86 P 268; Mathey v. Mathey, 109 M 467, 473, 98 P 2d 373.

Executors and Administrators \Rightarrow 314, 315.
34 C.J.S. Executors and Administrators
§ 513 et seq.

CHAPTER 38

DETERMINATION OF HEIRSHIP AND INTEREST IN ESTATE

- Section 91-3801. Proceedings to determine heirship.
91-3802. Appearance of parties.
91-3803. Trial and judgment.

91-3801. (10324) Proceedings to determine heirship. Any person claiming to be heir to the deceased, or entitled to the distribution in whole or in part of an estate may, at any time after the issuing of letters testamentary or of administration upon such estate, file a petition in the matter of such estate, praying the court or judge to ascertain and declare the rights of all persons to said estate, and all interests therein, and to whom distribution thereof should be made. Upon the filing of such petition, the court or judge must make an order directing service of notice to all persons interested in said estate, to appear and show cause, on a day to be therein named, not less than sixty days nor more than four months from the date of the making of such order, in which notice shall be set forth the name of the deceased, the name of the executor or administrator of said estate, the names of all persons who may have appeared claiming any interest in said estate, in the course of the administration of the same, up to the time of the making of said order, and such other persons as the court or judge may direct, and also a description of the real estate whereof said

deceased died seized or possessed so far as known, described with certainty to a common intent; and requiring said persons, and all persons named or not named having or claiming any interest in the estate of said deceased, at the time and place in said order specified, to appear and exhibit, as hereinafter provided, their respective claims of heirship, ownership, or interest in said estate, to said court or judge, which notice shall be served in the same manner as a summons in a civil action; upon proof of which service, by affidavit or otherwise, to the satisfaction of the court or judge, the court or judge shall thereupon acquire jurisdiction to ascertain and determine the heirship, ownership, and interest of all parties in and to the property of said deceased, and such determination shall be final and conclusive in the administration of said estate, and of the title and ownership of said property, the court or judge must enter an order establishing proof of the service of such notice; provided, that whenever it appears to the satisfaction of the court or judge that such estate consists of personal property only, and upon application being made showing good reason therefor, the court or judge may, in its discretion, make an order directing service of said notice to all persons interested in said estate to be made by posting or publication, or both, for such shorter period as to the court or judge may appear proper and requisite.

History: En. Sec. 2840, C. Civ. Proc. 1895; re-en. Sec. 7670, Rev. C. 1907; amd. Sec. 1, Ch. 234, L. 1921; re-en. Sec. 10324, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1664.

in this chapter: Kirk v. Baker, 26 M 190, 192, 66 P 942.

Construction

In the construction of a statute it is not permissible to read something into or out of it to make it understandable or workable. In construing this and the two following sections a construction must be adopted that will give effect to all their provisions. In re Baxter's Estate, 101 M 504, 516, 54 P 2d 869.

Declaration of Relationship Admissible

In a proceeding under this section, a declaration of relationship is admissible under sec. 93-401-27. In re Colbert's Estate, 51 M 455, 467, 153 P 1022.

Enforcement of an Agreement to Devise

The district court, as a court of general original common law and equity jurisdiction, has concurrent jurisdiction with the district court, sitting as a probate court, of an action brought against an estate of a decedent to enforce an agreement made by deceased to devise a certain share in his property. Burns v. Smith, 21 M 251, 266, 53 P 742.

Heirship How Determined

The question of heirship and the interest of any heir may be determined, not only under this and the next two succeeding sections, but also upon a proceeding for the final distribution of an estate. In re Fleming's Estate, 38 M 57, 59, 98 P 648.

The complete procedure for determining the rights of all persons to an estate, and

Appeal from Proceedings

Where a motion to dismiss the appeal of an executor and some of the legatees from that portion of a "judgment," rendered in a proceeding had under this and the two following sections, based on the ground that an appeal does not lie from a part thereof, is denied upon consideration of exhaustive briefs of counsel, the determination will be deemed the law of the case on the submission of the question on its merits. In re Klein's Estate, 35 M 185, 202, 88 P 798.

Id. The denial of a motion to affirm an order of this district court, in the proceeding under this and the two following sections, refusing a new trial to an executor and some of the legatees, of issues found in favor of other legatees, is held not the law of the case upon final determination on the merits.

Burden of Proof

In a proceeding to establish heirship, the petitioner is plaintiff, and has the burden of proof. In re Colbert's Estate, 51 M 455, 469, 153 P 1022.

Claims Not Recognizable Until Established as Provided Herein

An administrator is not required to take notice of the claims of heirs until their heirship has been established as prescribed

all interests therein, and to whom distribution thereof should be made, must be held, upon well-known rules of statutory construction, to exclude every other procedure for determining such questions. In *re Fleming's Estate*, 38 M 57, 59, 98 P 648; In *re Colbert's Estate*, 51 M 455, 464, 153 P 1022.

Inasmuch as the procedure provided by this section and the two succeeding sections, for determining the rights of persons to an estate or an interest therein, excludes every other method, an independent civil action for that purpose was unauthorized, and depositions taken in it were not taken in a former action, and hence inadmissible in a proceeding instituted thereunder. In *re Colbert's Estate*, 51 M 455, 464, 153 P 1022.

Heirship Proceedings Not Civil Action

Proceedings to determine heirship, while partaking in form of the nature of a civil action, are not such, and therefore the provisions of sec. 93-9501, permitting parties to submit a civil action for determination by the district court upon an agreed statement of facts, have no application to such proceedings. In *re Spriggs' Estate*, 68 M 92, 93 et seq., 216 P 1108.

Jurisdiction of District Court

The district court sitting in probate to determine heirship has jurisdiction under this and the two following sections, not only to ascertain and determine the rights of heirs and individuals who may take by succession or will, but also those of all others who claim rights by virtue of assignments from heirs. In *re Baxter's Estate*, 101 M 504, 518, 54 P 2d 869.

Nature of Decree

Where the statutory procedure with relation to determination of heirship (this section), authorizing proceedings against persons who may have an interest in property without naming them in the order for service of notice, is followed, they, as well as their issue, are bound by the decree, which is in the nature of one in rem as to which all the world is charged with notice to the same extent as if they had been named. In *re Baxter's Estate*, 98 M 291, 39 P 2d 186.

Not Exclusive Jurisdiction in Probate Court

This section does not expressly confer exclusive jurisdiction upon the district court, sitting as a court of probate, to try the questions therein enumerated; nor can exclusive jurisdiction to do so be implied from the language of the section. *Burns v. Smith*, 21 M 251, 264, 53 P 742.

Notice Required

Where notice of the hearing of a petition for the distribution of an estate was not served upon an heir as required by this section, the decree rendered in the proceeding did not foreclose her rights as an heir. *State v. District Court et al.*, 62 M 60, 64 et seq., 203 P 860.

Order for Service of Notice—Naming "Other Persons"

A petition for the determination of heirship need not name the persons interested in the estate, and while the court in ordering service of notice must set forth the names of those who have appeared claiming an interest in the estate (this section), the matter of naming "such other persons" as the court may direct is left to its discretion. In *re Baxter's Estate*, 98 M 291, 39 P 2d 186.

Order for Service of Notice—Time for Appearance

Under this section, the court in directing service of notice in a proceeding to determine heirship must in the order specify a day to be fixed at not less than sixty days from the date of making the order for appearance of the persons interested in the estate; hence contention that the statute requires notice for a minimum of sixty days from and after the date of the last publication of the notice is without merit. In *re Baxter's Estate*, 98 M 291, 39 P 2d 186.

Proceedings Must Be Commenced by Petition

Held, in view of the provision of this section, that a proceeding to determine heirship must be presented by petition, that where the parties without filing a petition submitted the cause on an agreed statement of facts, the court did not acquire jurisdiction and its judgment therein was a nullity. In *re Spriggs' Estate*, 68 M 92, 93 et seq., 216 P 1108.

Suit Not Necessary Where Parties Are Agreed on Distributive Shares

This section does not require a suit to be brought to determine the distributive shares in an estate, where all the parties interested have agreed as to the share each is to receive, and a decree has been entered pursuant to such agreement. In *re Davis' Estate*, 27 M 490, 499, 71 P 757.

Vacating a Default

Held, under sec. 91-4311, that the provisions of sec. 93-3905, authorizing the district court to relieve a party from a default under conditions prescribed, are applicable to probate proceedings, and that under the second clause of that section

the court may, in a proceeding to determine heirship, permit an heir who from any cause was not personally served with the notice required by this section, to answer to the merits of the proceeding at any time within one year from the rendition of the judgment, and that the technical objection that such notice is not a "summons" and the proceeding not "an action" and that, therefore, sec. 93-3905 is inapplicable, cannot be sustained, in view of the rules of statutory construction in this case held. *State v. District Court et al.*, 83 M 400, 410, 272 P 525.

When Determination of Heirship Necessary—Foreign Heirs

While ordinarily proceedings to determine heirship under this section are not necessary as a condition precedent to the distribution of an estate, yet where a person claiming to be an heir is a resident of a foreign country the court must, under sec. 91-3901, determine the question of heirship as provided in this section and the two following, before decreeing distribution. *State v. District Court et al.*, 62 M 60, 64 et seq., 203 P 860.

When Determination of Heirship Unnecessary

Where there are no foreign heirs and where the persons entitled to share in an estate have been fully determined and there is no question raised as to their rights, the authority of the court to order distribution does not depend upon a prior determination of heirship under this section and the following section; but if the

court should deem a proceeding for such determination necessary, it would not be warranted in dismissing the petition for distribution, but should suspend it until such determination can be had. In *re McGovern's Estate*, 77 M 182, 203, 204, 250 P 812.

This district court has jurisdiction of an action against the administrator of an estate to compel specific performance of a contract of adoption entered into by his intestate; plaintiff in such an action claiming under the contract and adversely to the estate and not as an heir in privity with it, he is not required to proceed under this section and the three following sections, for the establishment of heirship. *Gravelin v. Porier et al.*, 77 M 260, 275 et seq., 250 P 823.

References

Cited or applied as sec. 2840, Code of Civil Procedure, in *In re Davis' Estate*, 35 M 273, 281, 88 P 957; as sec. 7670, Revised Codes, in *State ex rel. Kolbow v. District Court*, 38 M 415, 416, 100 P 207; in *re Colbert's Estate*, 44 M 259, 264, 119 P 791; in *re Beck's Estate*, 44 M 561, 569, 121 P 784, 1057; in *re Bernheim's Estate*, 82 M 198, 205, 266 P 378; in *re Mickich's Estate*, 114 M 258, 279, 136 P 2d 223; in *re Giebler's Estate*, ___ M ___, 162 P 2d 368, 369.

Descent and Distribution—71.

26 C.J.S. Descent and Distribution § 79 et seq.

16 Am. Jur. 830, Descent and Distribution, § 61.

91-3802. (10325) Appearance of parties. All persons appearing within the time limited must file their written appearance in person or through their authorized attorney, such attorney filing at the same time written evidence of his authority to so appear, which written evidence must be in the English language, or if in a foreign language, the same must be accompanied by an English translation thereof, duly certified as correct by a United States consul, entry of which appearance shall be made in the minutes of the court and in the register of proceedings of said estate. And the court or judge shall, after the expiration of the time limited for appearing as aforesaid, enter an order adjudging the default of all persons for not appearing as aforesaid, who shall not have appeared as aforesaid. At any time within twenty days after the date of the order of the court or judge establishing proof of service of such notice, any of such persons so appearing may file his complaint in the matter of the estate, setting forth the facts constituting his claim of heirship, ownership, or interest in said estate, with such reasonable particularity as the court or judge may require, and serve a copy of the same upon each of the parties or attorneys who shall have entered their written appearance as aforesaid, if such parties or such attorneys reside within the county; and in case any of them do not reside within the county, then service of such copy of said

complaint shall be made upon the clerk of said court for them, and the clerk shall forthwith mail the same to the address of such party or attorney as may have left with said clerk his postoffice address. Such parties are allowed twenty days after the service of the complaint, as aforesaid, within which to plead thereto, and thereafter such proceedings shall be had upon such complaint as in this code provided in case of an ordinary civil action; and the issues of law and of fact arising in the proceeding shall be disposed of in like manner as issues of law and fact are herein provided to be disposed of in civil actions, with a like right to a motion for a new trial and appeal to the supreme court; and the provisions in this code contained, regulating the mode of procedure for the trial of civil actions, the motion for a new trial of civil actions, statements on motion for a new trial, bills of exceptions, and statements on appeal, as also in regard to undertakings on appeal, and the mode of taking and perfecting appeals, and the time within which such appeals shall be taken, shall be applicable thereto; provided, however, that all appeals herein must be taken within sixty days from the date of the entry of the judgment or the order complained of.

History: En. Sec. 2841, C. Civ. Proc. 1895; re-en. Sec. 7671, Rev. C. 1907; amd. Sec. 1, Ch. 54, L. 1913; re-en. Sec. 10325, R. C. M. 1921.

Determining Interests on Theory of Equitable Assignment

Where bonding company claimed an equitable assignment of principal's distributive share of estate on theory that an agreement in application for bond to indemnify surety for expense of suit incurred under the bond constituted such assignment, and proceeded under secs. 91-3801 to 91-3803 to determine heirship and interests in estate, held, that neither statutory nor contractual liability constitute equitable assignment of principal's property; nor does plaintiff's claim have priority over all other claims; held, further, that query as to litigation of question under this procedure unnecessary of decision. *Maryland Casualty Co. v. Walsh*, 116 M 559, 562, 155 P 2d 759.

Evidence of Authority

Held, power of attorney filed in this case for proof of authority of counsel in heirship matter fully complied with the requirement. In *re Astibia's Estate*, 100 M 224, 233, 46 P 2d 712.

Operation and Effect

In a proceeding to determine the rights of a large number of persons claiming to

be legatees under a will, and where the executor and certain claimants, adjudged to be entitled to share in the distribution of the estate, moved for a new trial of the issues found in favor of certain other claimants, the aggrieved parties may move for a new trial and appeal from an adverse ruling. In *re Klein's Estate*, 35 M 185, 201, 88 P 798.

Under this section, an attorney claiming a right to appear in behalf of an heir at a proceeding to determine heirship must file written evidence of his authority to so appear, otherwise the heir is not barred from questioning the jurisdiction of the court to render the decree. *State v. District Court et al.*, 62 M 60, 64, 203 P 860.

References

Cited or applied as sec. 7671, Revised Codes, before amendment, in *In re Fleming's Estate*, 38 M 57, 59, 98 P 648; *State ex rel. Kolbow v. District Court*, 38 M 415, 419, 100 P 207; *In re Colbert's Estate*, 44 M 259, 264, 119 P 791; *In re Colbert's Estate*, 51 M 455, 464, 153 P 1022; *In re McGovern's Estate*, 77 M 182, 203, 250 P 812; *Gravelin v. Porier et al.*, 77 M 260, 275, 250 P 823; *State v. District Court et al.*, 83 M 400, 410, 272 P 525; *In re Baxter's Estate*, 98 M 291, 39 P 2d 186; *In re Mickich's Estate*, 114 M 258, 279, 136 P 2d 223; *In re Giebler's Estate*, ___ M ___, 162 P 2d 368, 369.

91-3803. (10326) Trial and judgment. The party filing the petition as aforesaid, if he file a complaint, and if not, the party first filing such complaint, must in all subsequent proceedings be treated as the plaintiff therein, and all other parties so appearing must be treated as the defendants in said

proceedings, and all such defendants shall set forth in their respective answers the facts constituting their claims of heirship, ownership, or interest in said estate, with such particularity as a court or judge may require, and serve a copy thereof on the plaintiff. Evidence in support of all issues may be taken orally or by deposition, in the same manner as provided in civil actions. Notice of the taking of such depositions shall be served only upon the parties or the attorneys of the parties so appearing in said proceeding. The court or judge shall enter a default of all persons failing to appear, or plead, or prosecute, or defend their rights as aforesaid; and upon the trial of the issues arising upon the pleadings in such proceedings, the court or judge shall determine the heirship to said deceased, the ownership of his estate, and the interest of each respective claimant thereto or therein, and persons entitled to distribution thereof, and the final determination of the court or judge thereupon shall be final and conclusive in the distribution of said estate, and in regard to the title to all the property of the estate, and in regard to the title to all the property of the estate of said deceased. The cost of the proceedings under this chapter shall be apportioned in the discretion of the court or judge. In such proceeding, the court or judge may appoint an attorney for any minor not having a guardian. Nothing in this chapter shall be construed to exclude the right upon final distribution of any estate to contest the question of heirship, title, or interest in the estate so distributed, where the same shall not have been determined under the provisions of sections 91-3801 to 91-3803, inclusive, but where the questions shall have been litigated under the provisions of these sections, the determination thereof, as therein provided, shall be conclusive in the distribution of said estate.

History: En. Sec. 2842, C. Civ. Proc. 1895; re-en. Sec. 7672, Rev. C. 1907; re-en. Sec. 10326, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1664.

Finality of Decree

Failure of heirs to attack assignments of their interests for extrinsic fraud in proceedings to establish heirship, decree in which was not entered until about a year and a half after they had begun, precluded attack thereon in the subsequent proceedings for distribution, in view of the provisions of this section that the final determination of the court in the heirship proceedings shall be conclusive in the distribution of the estate. In re Baxter's Estate, 101 M 504, 519, 54 P 2d 869.

References

Cited or applied as sec. 2842, Code of Civil Procedure, in In re Klein's Estate, 35 M 185, 202, 88 P 798; as sec. 7672, Revised Codes, in In re Fleming's Estate, 38 M 57, 59, 98 P 648; In re Beck's Estate, 44 M 561, 569, 121 P 784, 1057; In re Colbert's Estate, 51 M 455, 464, 153 P 1022; State v. District Court et al., 62 M 60, 65, 203 P 860; Gravelin v. Porier et al., 77 M 260, 275, 250 P 823; Link v. Haire, 82 M 406, 410, 267 P 952; In re Baxter's Estate, 98 M 291, 39 P 2d 186; In re Mickich's Estate, 114 M 258, 279, 136 P 2d 223; In re Giebler's Estate, — M —, 162 P 2d 368, 369.

CHAPTER 39

FINAL DISTRIBUTION OF ESTATE—DISCHARGE OF EXECUTOR OR ADMINISTRATOR

- Section 91-3901. Distribution of estate—how made and to whom.
 91-3902. Order of distribution, contents and finality of.
 91-3903. Distribution when decedent was not a resident of this state.
 91-3904. Decree to be made only after notice.
 91-3905. No distribution till taxes on personal property are paid.

91-3906. Final settlement, order and discharge.

91-3907. Discovery of property.

91-3901. (10327) Distribution of estate—how made and to whom. (1)

Upon the final settlement of the accounts of the executor or administrator, or at any subsequent time, upon the application of the executor or administrator, or any heir, legatee, or devisee, the court or judge must proceed to distribute the residue of the estate in the hands of the executor or administrator, if any, among the persons who by law are entitled thereto; and if the decedent has left a surviving child, and the issue of other children, and any of them, before the close of the administration, have died while under age and not having been married, no administration on such deceased child's estate is necessary, but all the estate which such deceased child was entitled to by inheritance must, without administration, be distributed to the other heirs at law; provided, that whenever it appears any of the persons claiming to be heirs, or claiming a right to share in said estate, are nonresidents of the United States, then a proceeding to determine their rights shall be held under the provisions and as provided for in the three preceding sections with reference to the determination of heirship.

(2) Whenever all the heirs or devisees of any estate who are residents of the United States shall agree that any nonresident of the United States is a lawful heir or devisee of said estate and is lawfully entitled to share therein, said agreement may be reduced to writing and filed with the clerk of the court in the matter of said estate, and thereafter it shall not be necessary for any such nonresident heir or devisee to institute any proceedings to determine his rights of heirship. A statement of any receipts and disbursements of the executor or administrator, since the rendition of his final accounts, must be reported and filed at the time of making such distribution; and a settlement thereof, together with an estimate of the expenses of closing the estate, must be made by the court or judge, and included in the order; or the court or judge may order notice of the settlement of such supplementary account, and refer the same as in other cases of the settlement of accounts.

History: En. Sec. 289, p. 315, L. 1877; re-en. Sec. 289, 2nd Div. Rev. Stat. 1879; re-en. Sec. 289, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2843, C. Civ. Proc. 1895; re-en. Sec. 7673, Rev. C. 1907; amd. Sec. 2, Ch. 54, L. 1913; amd. Sec. 2, Ch. 234, L. 1921; re-en. Sec. 10327, E. C. M. 1921. Cal. C. Civ. Proc. Sec. 1665.

Operation and Effect

The giving of notice of final distribution of an estate is jurisdictional; hence where a final decree of distribution had been set aside in an equity action for want of notice to one of the interested parties, entry of a corrected decree to conform to that rendered in the suit to set aside without notice was a nullity. *Hoppin v. Long*, 74 M 558, 566 et seq., 241 P 636.

Under sec. 91-3706 and this section, relative to distribution of estates, failure of petitioners to serve nonappearing devisees with process does not deprive the

court of jurisdiction to make the order of distribution, it being presumed, in the absence of any showing to the contrary, that the notice required by sec. 91-3904 to be given by posting or publication was caused to be given by the court or judge. In *re McGovern's Estate*, 77 M 182, 203, 250 P 812.

References

State v. District Court et al., 62 M 60, 65, 203 P 860; In *re Bernheim's Estate*, 82 M 198, 215, 266 P 378; *State ex rel. Regis v. District Court*, 102 M 74, 83, 55 P 2d 1295; In *re Nielsen's Estate*, ___ M ___, 165 P 2d 792.

Executors and Administrators—314, 315.
34 C.J.S. Executors and Administrators § 513 et seq.

21 Am. Jur. 625, Executors and Administrators, §§ 427 et seq.

91-3902. (10328) Order of distribution, contents and finality of. In the order, the court or judge must name the persons and the proportions or parts to which each shall be entitled, and such persons may demand, sue for, and recover their respective shares from the executor or administrator, or any person having the same in possession. Such order is conclusive as to the rights of heirs, legatees, or devisees, subject only to be reversed, set aside, or modified on appeal.

History: En. Sec. 290, p. 315, L. 1877; re-en. Sec. 290, 2nd Div. Rev. Stat. 1879; re-en. Sec. 290, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2844, C. Civ. Proc. 1895; re-en. Sec. 7674, Rev. C. 1907; re-en. Sec. 10328, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1666.

Operation and Effect

A decree of distribution, though not strictly speaking a judgment, is treated and reviewable as such and may be set aside if obtained by fraud. *Hoppin v. Long*, 74 M 558, 578, 241 P 636.

Notwithstanding the provision of this section that a decree directing the distribution of the property of an estate is conclusive unless reversed, set aside or modified on appeal, the district court may set it aside under sec. 93-3905 on a showing by an aggrieved party that it had been taken against him through his mistake, surprise, inadvertence or excusable neglect. *State ex rel. O'Neil v. District Court et al.*, 96 M 393, 396 et seq., 30 P 2d 815.

91-3903. (10329) Distribution when decedent was not a resident of this state. Upon application for distribution, after final settlement of the accounts of administration, if the decedent was a nonresident of this state, leaving a will which has been duly proved or allowed in the state of his residence, and an authenticated copy thereof has been admitted to probate in this state, and it is necessary, in order that the estate, or any part thereof, may be distributed according to the will, that the estate in this state should be delivered to the executor or administrator in the state or place of his residence, the court or judge may order such delivery to be made, and, if necessary, order a sale of the real estate, and a like delivery of the proceeds. The delivery, in accordance with the order of the court or judge, is a full discharge of the executor or administrator with the will annexed, in this state, in relation to all property embraced in such order, which, unless reversed on appeal, binds and concludes all parties in interest. Sales of real estate, ordered by virtue of this section, must be made in the same manner as other sales of real estate of decedents by order of the court or judge.

History: En. Sec. 291, p. 315, L. 1877; re-en. Sec. 291, 2nd Div. Rev. Stat. 1879; re-en. Sec. 291, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2845, C. Civ. Proc. 1895; re-en. Sec. 7675, Rev. C. 1907; re-en. Sec. 10329, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1667.

Operation and Effect

The duties imposed upon the court by

Federal court was without jurisdiction to set aside decree of probate court of state when law provided ample means for revision and correction of probate decrees by probate courts themselves. *Montgomery v. Gilbert*, 77 F. 2d 39.

Supersedes the Provisions of Will Itself

Under Montana law, where conflict may be thought to exist, the order of final distribution supersedes the provisions of the will itself. *Blacker v. Thatcher*, 145 F. 2d 255, 256.

References

Cited or applied as sec. 2844, Code of Civil Procedure, in *Spencer v. Spencer*, 31 M 631, 637, 79 P 320; *Town of Cascade v. County of Cascade*, 75 M 304, 312, 243 P 806; *In re Baxter's Estate*, 98 M 291, 39 P 2d 186; *In re Murphy's Estate*, 99 M 114, 43 P 2d 233.

this section do not deprive it of jurisdiction to collect an inheritance tax. *State ex rel. Floyd v. District Court*, 41 M 357, 364, 109 P 438.

Id. The delivery provided for by this section, when the property is ready for distribution, serves all the purposes of distribution, and the power to direct the delivery is tantamount to the power to order

distribution directly to the persons entitled to take.

References

In re Mauldin's Estate, 69 M 132, 138,

220 P 1102; In re Livingston's Estate, 91 M 584, 589, 9 P 2d 159.

Executors and Administrators \S 523.

34 C.J.S. Executors and Administrators \S 1006.

91-3904. (10330) Decree to be made only after notice. The order may be made on the petition of the executor or administrator, or of any person interested in the estate. Notice of the application must be given by posting or publication, as the court or judge may direct, and for such time as may be ordered. If partition be applied for, as provided in this chapter, the order of distribution shall not divest the court of jurisdiction to order partition, unless the estate is finally closed.

History: En. Sec. 292, p. 316, L. 1877; re-en. Sec. 292, 2nd Div. Rev. Stat. 1879; re-en. Sec. 292, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2846, C. Civ. Proc. 1895; re-en. Sec. 7676, Rev. C. 1907; re-en. Sec. 10330, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1668.

Operation and Effect

The giving of notice of final distribution of an estate is jurisdictional; hence where a final decree of distribution had been set aside in an equity action for want of notice to one of the interested parties, entry of a corrected decree to conform to that rendered in the suit to set aside without notice was a nullity. *Hoppin v. Long*, 74 M 558, 566, 241 P 636.

Under secs. 91-3706 and 91-3901, relative to distribution of estates, failure of petitioners to serve nonappearing devisees with process does not deprive the court of jurisdiction to make the order of distribution, it being presumed in the absence

of any showing to the contrary, that the notice required by this section to be given by posting or publication was caused to be given by the judge. In re McGovern's Estate, 77 M 182, 185, 250 P 812.

One acquiring the interest of an heir in an estate at execution sale is entitled to no other notice of a proceeding instituted for the modification of the decree of distribution of the property of the estate than is required to be given to the heir to whose rights he succeeded, i.e., by posting or publication, such notice serving the purpose of a summons in ordinary actions. *State ex rel. O'Neil v. District Court et al.*, 96 M 393, 399 et seq., 30 P 2d 815.

References

State ex rel. Brophy v. District Court, 97 M 83, 84, 33 P 2d 266; *State ex rel. Regis v. District Court*, 102 M 74, 83, 55 P 2d 1295.

91-3905. (10331) No distribution till taxes on personal property are paid. Before any order of distribution of an estate is made, the court or judge must be satisfied, by the oath of the executor or administrator, or otherwise, that all the state, county, and municipal taxes, legally levied upon personal property of the estate, have been fully paid.

History: En. Sec. 293, p. 316, L. 1877; re-en. Sec. 293, 2nd Div. Rev. Stat. 1879; re-en. Sec. 293, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2847, C. Civ. Proc. 1895; re-en. Sec. 7677, Rev. C. 1907; re-en. Sec. 10331, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1669.

References

Cited or applied as sec. 2847, Code of Civil Procedure, in *Kirk v. Baker*, 26 M 190, 192, 66 P 942; *Hulburt v. Commissioner of Internal Revenue*, 296 U. S. 300, 311, 80 L. Ed. 242.

Cross-Reference

Personal property taxes paid before distribution of estate, sec. 84-4110.

Executors and Administrators \S 295, 296.

34 C.J.S. Executors and Administrators \S 487.

91-3906. (10332) Final settlement, order and discharge. When the estate has been fully administered, and it is shown by the executor or administrator, by the production of satisfactory vouchers, that he has paid all sums of money due from him, and delivered up, under the order of the court or judge, all the property of the estate to the parties entitled, and performed

all the acts lawfully required of him, the court or judge must make an order discharging him from all liability to be incurred thereafter.

History: En. Sec. 2886, C. Civ. Proc. 1895; re-en. Sec. 7696, Rev. C. 1907; re-en. Sec. 10332, R. C. M. 1021. Cal. C. Civ. Proc. Sec. 1697.

Guardian Liable for Accumulated Rentals Due Ward from Himself

Where a guardian occupied residence property of which he and his ward were equal half owners, it was the guardian's duty to collect the rent due his ward from himself accrued to time of his appointment, again at the time his bond became effective, and at all times until his powers were suspended, and he and his surety, for prior as well as prospective defaults, were

liable therefor, and under this section, not entitled to discharge until upon completion of his administration he has paid over all accumulated sums due from him. *Mitchell v. Columbia Casualty Co.*, 111 M 88, 93, 106 P 2d 344.

References

State v. District Court et al., 76 M 143, 148, 245 P 148.

Executors and Administrators—35, 508 (1).

34 C.J.S. Executors and Administrators § 903.

91-3907. (10333) Discovery of property. The final settlement of an estate, as in sections 91-3701 to 91-4203 provided, shall not prevent a subsequent issue of letters testamentary or of administration, or of administration with the will annexed, if other property of the estate be discovered, or if it become necessary or proper for any cause that letters should be again issued.

History: En. Sec. 2887, C. Civ. Proc. 1895; re-en. Sec. 7697, Rev. C. 1907; re-en. Sec. 10333, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1698.

Executors and Administrators—23, 513 (15).

33 C.J.S. Executors and Administrators §§ 48, 88; 34 C.J.S. Executors and Administrators § 905.

References

Montgomery v. Gilbert, 77 F. 2d 39.

CHAPTER 40

PARTITION OF UNDIVIDED ESTATES AFTER DISTRIBUTION

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| Section | 91-4001. Estate in common—commissioners. |
| | 91-4002. Partition and notice thereof, and the time of filing petition. |
| | 91-4003. Estate in different counties—how divided. |
| | 91-4004. Partition may be made, although some of the heirs, etc., have parted with their interest. |
| | 91-4005. Shares to be set out by metes and bounds. |
| | 91-4006. Whole estate may be assigned to one, in certain cases. |
| | 91-4007. Payments for equality of partition, by whom and how. |
| | 91-4008. Estate may be sold. |
| | 91-4009. To give notice to all persons and guardians before partition—duties of commissioners. |
| | 91-4010. To make report, and partition to be recorded. |
| | 91-4011. When commissioners to make partition are not necessary. |
| | 91-4012. Advancements made to heirs. |

91-4001. (10334) Estate in common—commissioners. When the estate, real or personal, assigned by the order of distribution to two or more heirs, devisees, or legatees, is in common and undivided, and the respective shares are not separated and distinguished, partition or distribution may be made by three disinterested persons, to be appointed commissioners for that purpose by the court or judge, who must be duly sworn to the faithful discharge of their duties. A certified copy of the order of their appointment, and of the order assigning and distributing the estate, must be

issued to them as their warrant, and their oath must be indorsed thereon. Upon consent of the parties, or when the court or judge deems it proper and just, it is sufficient to appoint one commissioner only, who has the same authority and is governed by the same rules as if three were appointed.

History: En. Sec. 294, p. 317, L. 1877; re-en. Sec. 294, 2nd Div. Rev. Stat. 1879; re-en. Sec. 294, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2860, C. Civ. Proc. 1895; re-en. Sec. 7678, Rev. C. 1907; re-en. Sec. 10334, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1675.

Operation and Effect

The purpose of this chapter was to vest in the court, when sitting in probate, the power to partition, among the distributees of an estate entitled to interests therein, real or personal property owned in severalty by the decedent in his lifetime, thus obviating the necessity for an independent proceeding brought after the close of the administration to accomplish the same result. *State ex rel. Goodman v. District Court*, 46 M 492, 495, 128 P 913.

That distribution of real property of an

estate will result in loss and inconvenience to the devisees is of no concern to the executor, and the latter cannot defeat a petition for such distribution on the ground that for that reason a prior order of sale should stand, under this section and the following, these sections being applicable only to action by the court after distribution and at the instance of interested parties. In *re McGovern's Estate*, 77 M 182, 203, 250 P 812.

References

Hoppin v. Long, 74 M 558, 569, 241 P 636.

Partition—36 et seq.

47 C.J. Partition § 216½.

40 Am. Jur. 48, Partition, § 60.

91-4002. (10335) Partition and notice thereof, and the time of filing petition. Such partition may be ordered and had in the district court on the petition of any person interested. But before commissioners are appointed, or partition ordered by the court or judge, as directed in this chapter, notice thereof must be given to all persons interested who reside in this state, or to their guardians, and to the agents, attorneys, or guardians, if any in this state, of such as reside out of this state, either personally or by public notice, as the court may direct. The petition may be filed, attorneys, guardians, and agents appointed, and notice given at any time before the order of distribution, but the commissioners must not be appointed until the order is made distributing the estate.

History: En. Sec. 295, p. 317, L. 1877; re-en. Sec. 295, 2nd Div. Rev. Stat. 1879; re-en. Sec. 295, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2861, C. Civ. Proc. 1895; re-en. Sec. 7679, Rev. C. 1907; re-en. Sec. 10335, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1676.

Operation and Effect

When a proceeding for partition has been instituted, the decree of distribution, though final in form, performs only the office of ascertaining definitely who are entitled to the succession and the interest of each distributee, the vesting of title in the allottees, the assignee, or purchaser, as the case may be, being left in abeyance until the confirmation of the report of the commissioners. *State ex rel. Goodman v. District Court*, 46 M 492, 496, 128 P 913.

Id. The power to make partition among the distributees of an estate is vested in the court as an incident of administration.

That distribution of real property of an estate will result in loss and inconvenience to the devisees is of no concern to the executor, and that latter cannot defeat a petition for such distribution on the ground that for that reason a prior order of sale should stand, under this section and the preceding one, these sections being applicable only to action by the court after distribution and at the instance of interested parties. In *re McGovern's Estate*, 77 M 182, 203, 250 P 812.

Partition—25 (2), 36 et seq., 51, 66, 91.

47 C.J. Partition §§ 136 et seq., 216½, 293 et seq., 390 et seq., 458 et seq.

40 Am. Jur. 22, Partition, §§ 27 et seq.

91-4003. (10336) Estate in different counties—how divided. If the real estate is in different counties, the court or judge may, if deemed proper, appoint commissioners for all, or different commissioners for each county.

The estate in each county must be divided separately among the heirs, legatees, or devisees, as if there were no other estate to be divided; but the commissioners first appointed must, unless otherwise directed by the court or judge, make division of such real estate wherever situated within this state.

History: En. Sec. 296, p. 317, L. 1877; re-en. Sec. 296, 2nd Div. Rev. Stat. 1879; re-en. Sec. 296, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2862, C. Civ. Proc. 1895; re-en. Sec. 7680, Rev. C. 1907; re-en. Sec. 10336, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1677.

Partition[Ⓒ]91, 92.
47 C.J. Partition §§ 458 et seq., 550 et seq.

91-4004. (10337) Partition may be made, although some of the heirs, etc., have parted with their interest. Partition or distribution of the real estate may be made as provided in this chapter, although some of the original heirs, legatees, or devisees may have conveyed their shares to other persons, and such shares must be assigned to the person holding the same, in the same manner as they otherwise would have been to such heirs, legatees, or devisees.

History: En. Sec. 297, p. 318, L. 1877; re-en. Sec. 297, 2nd Div. Rev. Stat. 1879; re-en. Sec. 297, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2863, C. Civ. Proc. 1895; re-en.

Sec. 7681, Rev. C. 1907; re-en. Sec. 10337, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1678.

Partition[Ⓒ]26.
47 C.J. Partition § 143 et seq.

91-4005. (10338) Shares to be set out by metes and bounds. When both distribution and partition are made, the several shares in the real and personal estate must be set out to each individual in proportion to his right, by metes and bounds, or description, so that the same can be easily distinguished, unless two or more of the parties interested consent to have their shares set out so as to be held by them in common and undivided.

History: En. Sec. 298, p. 318, L. 1877; re-en. Sec. 298, 2nd Div. Rev. Stat. 1879; re-en. Sec. 298, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2864, C. Civ. Proc. 1895; re-en. Sec. 7682, Rev. C. 1907; re-en. Sec. 10338, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1679.

References
Cited or applied as sec. 7682, Revised Codes, in State ex rel. Goodman v. District Court, 46 M 492, 496, 128 P 913.

91-4006. (10339) Whole estate may be assigned to one, in certain cases. When the real estate cannot be divided without prejudice or inconvenience to the owners, the court or judge may assign the whole to one or more of the parties entitled to the share therein, who will accept it, always preferring the males to the females, and, among children, preferring the elder to the younger. The parties accepting the whole must pay to the other parties interested their just proportion of the true value thereof, or secure the same to their satisfaction, or in case of the minority of such party, then to the satisfaction of his guardian; and the true value of the estate must be ascertained and reported by the commissioners. When the commissioners appointed to make partition are of the opinion that the real estate cannot be divided without prejudice or inconvenience to the owners, they must so report to the court or judge, and recommend that the whole be assigned as herein provided, and must find and report the true value of such real estate. On filing the report of the commissioners, and on making or securing the payment as before provided, the court or judge, if it appears

just and proper, must confirm the report, and thereupon the assignment is complete, and the title to the whole of such real estate vests in the person to whom the same is assigned.

History: En. Sec. 299, p. 318, L. 1877; re-en. Sec. 299, 2nd Div. Rev. Stat. 1879; re-en. Sec. 299, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2865, C. Civ. Proc. 1895; re-en. Sec. 7683, Rev. C. 1907; re-en. Sec. 10339, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1680.

References

Cited or applied as sec. 7683, Revised Codes, in State ex rel. Goodman v. District Court, 46 M 492, 496, 128 P 913.

Partition↔98.

47 C.J. Partition § 633 et seq.

40 Am. Jur. 44, Partition, §§ 52-57.

91-4007. (10340) Payments for equality of partition, by whom and how.

When any tract of land or tenement is of greater value than any one's share in the estate to be divided, and cannot be divided without injury to the same, it may be set off by the commissioners appointed to make partition to any of the parties who will accept it, giving preference as prescribed in the preceding section. The party accepting must pay or secure to the others such sums as the commissioners shall award to make the partition equal, and the commissioners must make their award accordingly; but such partition must not be established by the court or judge until the sums awarded are paid to the parties entitled to the same, or secured to their satisfaction.

History: En. Sec. 300, p. 319, L. 1877; re-en. Sec. 300, 2nd Div. Rev. Stat. 1879; re-en. Sec. 300, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2866, C. Civ. Proc. 1895; re-en. Sec. 7684, Rev. C. 1907; re-en. Sec. 10340, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1681.

References

Cited or applied as sec. 7684, Revised Codes, in State ex rel. Goodman v. District Court, 46 M 492, 496, 128 P 913.

Partition↔84.

47 C.J. Partition § 518 et seq.

91-4008. (10341) Estate may be sold. When it appears to the court or judge, from the commissioners' report, that it cannot otherwise be fairly divided, and should be sold, the court or judge may order the sale of the whole or any part of the estate, real or personal, by the executor or administrator, or by a commissioner appointed for that purpose, and the proceeds distributed. The sale must be conducted, reported, and confirmed in the same manner and under the same requirements provided in sections 91-3001 to 91-3039.

History: En. Sec. 301, p. 319, L. 1877; re-en. Sec. 301, 2nd Div. Rev. Stat. 1879; re-en. Sec. 301, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2867, C. Civ. Proc. 1895; re-en. Sec. 7685, Rev. C. 1907; re-en. Sec. 10341, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1682.

Codes, in State ex rel. Goodman v. District Court, 46 M 492, 496, 128 P 913.

Partition↔77, 100-112.

47 C.J. Partition §§ 435 et seq., 656 et seq., 745 et seq.

40 Am. Jur. 72, Partition, § 83 et seq.

References

Cited or applied as sec. 7685, Revised

91-4009. (10342) To give notice to all persons and guardians before partition—duties of commissioners. Before any partition is made or any estate divided, as provided in this chapter, notice must be given to all persons interested in the partition, their guardians, agents, or attorneys, by the commissioners, of the time and place when and where they shall proceed to make partition. The commissioners may take testimony, order surveys,

and take such other steps as may be necessary to enable them to form a judgment upon the matters before them.

History: En. Sec. 302, p. 319, L. 1877; re-en. Sec. 2868, C. Civ. Proc. 1895; re-en. re-en. Sec. 302, 2nd Div. Rev. Stat. 1879; Sec. 7686, Rev. C. 1907; re-en. Sec. 10342, re-en. Sec. 302, 2nd Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1683.

91-4010. (10343) To make report, and partition to be recorded. The commissioners must report their proceedings, and the partition agreed upon by them, to the court or judge, in writing, and the court or judge may, for sufficient reasons, set aside the report and commit the same to the same commissioners, or appoint others; and when such report is finally confirmed, a certified copy of the order of partition made thereon, attested by the clerk under the seal of the court, must be recorded in the office of the county clerk of the county where the lands lie.

History: En. Sec. 303, p. 320, L. 1877; re-en. Sec. 303, 2nd Div. Rev. Stat. 1879; re-en. Sec. 303, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2869, C. Civ. Proc. 1895; re-en. Sec. 7687, Rev. C. 1907; re-en. Sec. 10343, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1684.

Partition↔94.
47 C.J. Partition § 589 et seq.

91-4011. (10344) When commissioners to make partition are not necessary. When the court or judge makes an order assigning the residue of any estate to one or more persons entitled to the same, it is not necessary to appoint commissioners to make partition or distribution thereof, unless the parties to whom the assignment is made, or some of them, request that such partition be made.

History: En. Sec. 304, p. 320, L. 1877; re-en. Sec. 2870, C. Civ. Proc. 1895; re-en. re-en. Sec. 304, 2nd Div. Rev. Stat. 1879; Sec. 7688, Rev. C. 1907; re-en. Sec. 10344, re-en. Sec. 304, 2nd Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1685.

91-4012. (10345) Advancements made to heirs. All questions as to advancements made, or alleged to have been made, by the decedent to his heirs, may be heard and determined by the court or judge, and must be specified in the order assigning and distributing the estate; and the final order of the court or judge, or in case of appeal, of the supreme court, is binding on all parties interested in the estate.

History: En. Sec. 305, p. 320, L. 1877; re-en. Sec. 305, 2nd Div. Rev. Stat. 1879; re-en. Sec. 305, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2871, C. Civ. Proc. 1895; re-en. Sec. 7689, Rev. C. 1907; re-en. Sec. 10345, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1686.

References

Cited or applied as sec. 7689, Revised Codes, in State ex rel. Goodman v. District Court, 46 M 492, 495, 128 P 913.

Descent and Distribution↔71.
26 C.J.S. Descent and Distribution § 79 et seq.

CHAPTER 41

APPOINTMENT OF AGENT FOR PERSONS RESIDING OUT OF THE STATE

- Section 91-4101. Court may appoint agent to take possession for absentees.
91-4102. Bond and compensation of agent.
91-4103. Unclaimed estate—how disposed of.
91-4104. Account of agent annually required.
91-4105. Liability of agent on his bond.
91-4106. Certificate to claimant.

91-4101. (10346) Court may appoint agent to take possession for absentees. When any estate is assigned or distributed by an order of the court or judge, as provided in sections 91-3701 to 91-4203, to any person residing out of, and having no agent in this state, and it is necessary that some person should be authorized to take possession and charge of the same for the benefit of such absent person, the court or judge may appoint an agent for that purpose, and authorize him to take charge of such estate, as well as to act for such absent person in the distribution.

History: En. Sec. 306, p. 320, L. 1877; re-en. Sec. 306, 2nd Div. Rev. Stat. 1879; re-en. Sec. 306, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2880, C. Civ. Proc. 1895; re-en. Sec. 7690, Rev. C. 1907; re-en. Sec. 10346, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1691.

References

Bottomly v. Meagher County, 114 M 220, 226, 133 P 2d 770.

Absentees[Ⓒ]5.

1 C.J.S. Absentees §§ 6-10.

91-4102. (10347) Bond and compensation of agent. The agent must execute a bond to the state of Montana, to be approved by the court or judge, conditioned that he shall faithfully manage and account for the estate. The court or judge appointing such agent may allow a reasonable sum out of the profits of the estate for his services and expenses.

History: En. Sec. 307, p. 320, L. 1877; re-en. Sec. 307, 2nd Div. Rev. Stat. 1879; re-en. Sec. 307, 2nd Div. Comp. Stat. 1887;

re-en. Sec. 2881, C. Civ. Proc. 1895; re-en. Sec. 7691, Rev. C. 1907; re-en. Sec. 10347, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1692.

91-4103. (10348) Unclaimed estate—how disposed of. When the personal property remains in the hands of the agent unclaimed for a year, and it appears to the court or judge that it is for the benefit of those interested, it shall be sold under the order of the court or judge, and the proceeds, after deducting the expenses of the sale allowed by the court or judge, must be paid into the state treasury. When the payment is made, the agent must take from the treasury duplicate receipts, one of which he must file in the office of the state auditor, and the other in the court.

History: En. Sec. 308, p. 321, L. 1877; re-en. Sec. 308, 2nd Div. Rev. Stat. 1879; re-en. Sec. 308, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2882, C. Civ. Proc. 1895; re-en. Sec. 7692, Rev. C. 1907; re-en. Sec. 10348, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1693.

References

Bottomly v. Meagher County, 114 M 220, 226, 133 P 2d 770.

Absentees[Ⓒ]6 et seq.; Escheat[Ⓒ]4, 6.

1 C.J.S. Absentees § 5; 30 C.J.S. Escheat §§ 2, 5, 7-18.

91-4104. (10349) Account of agent annually required. The agent must render the court or judge appointing him, annually, an account, showing:

1. The value and character of the property received by him, what portion thereof is still on hand, what sold, and for what;
2. The income derived therefrom;
3. The taxes and assessments imposed thereon, for what, and whether paid or unpaid;
4. The expenses incurred in the care, protection, and management thereof, and whether paid or unpaid. When filed, the court or judge may examine witnesses and take proofs in regard to the account, and if satisfied from such accounts and proofs that it will be for the benefit and advantage of the persons interested therein, the court or judge may, by order, direct a sale to be made of the whole or such parts of the real or

personal property as shall appear to be proper, and the purchase-money to be deposited in the state treasury.

History: En. Sec. 309, p. 321, L. 1877; re-en. Sec. 309, 2nd Div. Rev. Stat. 1879; re-en. Sec. 309, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2883, C. Civ. Proc. 1895; Sec. 7693, Rev. C. 1907; re-en. Sec. 10349, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1694.

91-4105. (10350) Liability of agent on his bond. The agent is liable on his bond for the care and preservation of the estate while in his hands, and for the payment of the proceeds of the sale as required in the preceding sections, and may be sued thereon by any person interested.

History: En. Sec. 310, p. 321, L. 1877; re-en. Sec. 310, 2nd Div. Rev. Stat. 1879; re-en. Sec. 310, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2884, C. Civ. Proc. 1895; Sec. 7694, Rev. C. 1907; re-en. Sec. 10350, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1695.

91-4106. (10351) Certificate to claimant. When any person appears and claims the money paid into the treasury, the court or judge making the distribution must inquire into such claim, and being first satisfied of his right thereto, must grant him a certificate to that effect, under seal; and upon the presentation of the certificate to him, the state auditor must draw his warrant on the treasurer for the amount.

NOTE.—Secs. 7696, 7697, Rev. C. 1907, en. with this section, re-en. as secs. 10332, 10333, R. C. M. 1921, secs. 91-3906 and 91-3907 of this code.

History: En. Sec. 311, p. 322, L. 1877; re-en. Sec. 311, 2nd Div. Rev. Stat. 1879; re-en. Sec. 311, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2885, C. Civ. Proc. 1895; re-en. Sec. 7695, Rev. C. 1907; re-en. Sec. 10351, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1696.

References

Bottomly v. Meagher County, 114 M 220, 226, 133 P 2d 770.

Absentees 6 et seq.; Escheat 8.

1 C.J.S. Absentees § 5; 30 C.J.S. Escheat § 20.

CHAPTER 42

SETTLEMENT OF ACCOUNTS OF TRUSTEES AFTER DISTRIBUTION OF ESTATE

Section 91-4201. Court not to lose jurisdiction of trusts by distribution—accounts of trustees.

91-4202. Compensation of trustees.

91-4203. Appeal from order settling account of trustee.

91-4201. (10352) Court not to lose jurisdiction of trusts by distribution—accounts of trustees. Where any trust has been created by or under any will to continue after distribution, the district court shall not lose jurisdiction of the estate by final distribution, but shall retain jurisdiction thereof for the purpose of the settlement of accounts under the trust. And any trustee created by any will, or appointed to execute any trust created by any will, may, from time to time, pending the execution of his trust, or may, at the termination thereof, render and pray for the settlement of his accounts as such trustee, before the district court in which the will was probated, and in the manner provided for the settlement of the accounts of executors and administrators. The trustee, or, in the case of his death, his legal representatives, shall, for that purpose, present to the court or judge his petition, setting forth his accounts in detail; and upon filing thereof, the court or judge shall fix a day for the hearing, and a citation

shall be issued citing all the beneficiaries of the said trust to appear and show cause why the account should not be allowed; such citation shall be personally served upon all the beneficiaries in the state, in the manner provided for the service of summons in civil actions, and shall be served upon all the beneficiaries, who shall appear by affidavit to be absent from the state, by publication in such manner as the court or judge may order, for not less than two months. And any such trustee may, in the discretion of the court or judge, upon application of any beneficiary of the trust, be ordered to appear and render his account, after being cited by service of citation as provided for the service of summons in civil cases. Upon the filing of the account so ordered, the same proceedings for the hearing and settlement thereof shall be had as are hereinbefore provided.

History: En. Sec. 2900, C. Civ. Proc. 1895; re-en. Sec. 7698, Rev. C. 1907; re-en. Sec. 10352, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1699.

Objecting Cestuis Que Trustent Not Entitled to Jury Trial

In a proceeding instituted under this section by testamentary trustees praying for settlement of their accounts, objecting cestuis que trustent were not entitled to trial by jury. In *re Harper's Estate*, 98 M 357, 361, 40 P 2d 51.

Operation and Effect

Since this section affords a plain, speedy and adequate remedy for the termination of testamentary trusts, a demurrer to a complaint in equity seeking the same relief will be sustained. *Philbrick v. American Bank & Trust Co.*, 58 M 376, 385, 193 P 59.

Id. This section confers exclusive jurisdiction upon the district court when sitting as a probate court, to determine whether the purpose of the testamentary trust has been accomplished, wherever it has acquired jurisdiction of the estate by probate of the will which has created a trust to continue after final distribution.

The district court, sitting in probate in a proceeding by testamentary trustees seeking settlement of their accounts, has the same general jurisdiction and powers as are exercised by a court of equity over trusts. In *re Harper's Estate*, 98 M 356, 40 P 2d 51.

Federal court was without jurisdiction to set aside decree of probate court of state when law provided ample means for revision and correction of probate decrees by probate courts themselves. *Montgomery v. Gilbert*, 77 F. 2d 39.

Testamentary Trustee's Duty to Make Account

A testamentary trustee must account to the district court sitting in probate, covering all his acts as trustee under the will under this section, the method thereby provided being exclusive; the will governing the trusteeship and the time for its determination. *Montgomery v. Gilbert*, 111 M 250, 275, 108 P 2d 616.

Time for Taking Appeal

In a proceeding to set aside a testamentary trust, brought under this section, an appeal from an order or decree made therein must be taken within sixty days after its making under sec. 91-4313. In *re Roberts' Estate*, 102 M 240, 259, 58 P 2d 495.

References

Cited or applied as sec. 2900, Code of Civil Procedure, in *In re Higgins' Estate*, 15 M 474, 502, 39 P 506.

Trusts—297 et seq.

65 C.J. Trusts § 793 et seq.

54 Am. Jur. 402, Trusts, §§ 506 et seq.

91-4202. (10353) Compensation of trustees. On all such accountings, the court or judge shall allow the trustee or trustees the proper expenses and such compensation for services as the court or judge may deem to be just and reasonable, and shall apportion such compensation among the trustees according to the services rendered by them respectively, and may, in its discretion, fix a yearly compensation for the trustee or trustees, to continue as long as the court or judge may deem proper.

History: En. Sec. 2901, C. Civ. Proc. 1895; re-en. Sec. 7699, Rev. C. 1907; re-en. Sec. 10353, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1700.

Trusts 315-321.

65 C.J. Trusts § 805 et seq.

54 Am. Jur. 416, Trusts, §§ 525 et seq.

91-4203. (10354) Appeal from order settling account of trustee. From an order settling such account appeal may be taken in the manner provided for an appeal from an order settling the account of an executor or administrator. The order of the district court, if affirmed on appeal or becoming final without appeal, shall be conclusive.

History: En. Sec. 2902, C. Civ. Proc. 1895; re-en. Sec. 7700, Rev. C. 1907; re-en. Sec. 10354, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1701.

Trusts 329.

65 C.J. Trusts § 864.

CHAPTER 43

PROBATE PROCEEDINGS, MISCELLANEOUS—CITATIONS—APPEALS, ETC.

- Section 91-4301. Orders and judgments need not recite jurisdictional facts—orders to be entered in minutes.
- 91-4302. How often publication should be made.
- 91-4303. Recorded order to impart notice from date of filing.
- 91-4304. Proceeding in chambers—jury trial.
- 91-4305. Style of citation.
- 91-4306. Citation—how issued.
- 91-4307. Citation—how served.
- 91-4308. Personal notice given by citation.
- 91-4309. Citation to be served five days before return.
- 91-4310. One description of real estate sought to be sold, being published, is sufficient for all purposes.
- 91-4311. Rules of practice generally.
- 91-4312. New trials and appeals.
- 91-4313. Within what time appeal must be taken.
- 91-4314. Issues joined—how tried and disposed of.
- 91-4315. Court to try case when no jury demanded—how and what issues to be tried.
- 91-4316. Court to appoint attorney for minor or absent heirs, devisees or legatees or creditors—when, and what compensation he is to receive.
- 91-4317. Orders setting apart homestead, confirming sale, etc., to be recorded.
- 91-4318. Costs—by whom paid in certain cases.
- 91-4319. Executor, etc., to be removed when committed for contempt.
- 91-4320. Service of process on guardian.
- 91-4321. Termination of life estate or joint tenancy.
- 91-4322. Power of clerk to issue orders and notices.
- 91-4323. Validation of sales by fiduciaries.

91-4301. (10355) Orders and judgments need not recite jurisdictional facts—orders to be entered in minutes. Orders and judgments made by the court or judge, in probate proceedings, need not recite the existence of facts, or the performance of acts, upon which the jurisdiction of the court or judge may depend, but it shall only be necessary that they contain the matters ordered, except as otherwise provided in this Title. All orders of the court or judge must be entered at length in the minute-book of the court kept for probate proceedings.

History: En. Sec. 314, p. 322, L. 1877; re-en. Sec. 314, 2nd Div. Rev. Stat. 1879; re-en. Sec. 314, 2nd Div. Comp. Stat. 1887; amd. Sec. 2910, C. Civ. Proc. 1895; re-en. Sec. 7701, Rev. C. 1907; re-en. Sec. 10355, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1704.

Operation and Effect

Where the clerk enters in the minute-book, at length, an order to show cause why real estate should not be sold, though the order purports to have been signed by the judge, such entry was sufficient evi-

dence of the fact that the order was duly made, as the signature may be treated as surplusage; and there is no requirement that the clerk shall recite that the order

was made. *Plains Land & Improvement Co. v. Lynch*, 38 M 271, 285, 99 P 847, 129 Am. St. Rep. 645.

91-4302. (10356) How often publication should be made. When any publication is ordered in any probate or guardianship proceeding, the provisions of sections 93-8718 and 93-8719 shall, unless otherwise expressly provided by statute or by the order of the court, govern the manner of making such publication.

History: En. Sec. 315, p. 322, L. 1877; re-en. Sec. 315, 2nd Div. Rev. Stat. 1879; re-en. Sec. 315, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2911, C. Civ. Proc. 1895; re-en.

Sec. 7702, Rev. C. 1907; re-en. Sec. 10356, R. C. M. 1921; amd. Sec. 1, Ch. 7, L. 1947. Cal. C. Civ. Proc. Sec. 1705.

91-4303. (10357) Recorded order to impart notice from date of filing. When it is provided in this Title that any order of the court or judge, or a copy thereof, must be recorded in the office of the county clerk, from the time of filing the same for record, notice is imparted to all persons of the contents thereof.

History: En. Sec. 316, p. 322, L. 1877; re-en. Sec. 316, 2nd Div. Rev. Stat. 1879; re-en. Sec. 316, 2nd Div. Comp. Stat. 1887;

re-en. Sec. 2912, C. Civ. Proc. 1895; re-en. Sec. 7703, Rev. C. 1907; re-en. Sec. 10357, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1706.

91-4304. (10358) Proceeding in chambers—jury trial. All orders mentioned in this Title, and all proceedings in matters of probate, may be made or heard either before the court or the judge thereof in chambers, and when a jury is needed, the court or judge may order the trial to take place in court as provided in Title 93.

History: En. Sec. 317, p. 322, L. 1877; re-en. Sec. 317, 2nd Div. Rev. Stat. 1879; re-en. Sec. 317, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2913, C. Civ. Proc. 1895; re-en. Sec. 7704, Rev. C. 1907; re-en. Sec. 10358, R. C. M. 1921.

References

Cited or applied as sec. 2913, Code of Civil Procedure, in *In re Davis' Estate*, 27 M 235, 242, 70 P 721.

91-4305. (10359) Style of citation. Citations must be directed to the person to be cited, signed by the clerk and issued under the seal of the court, and must contain:

1. The title of the proceeding;
2. The style of the citation, which shall be "The State of Montana";
3. A brief statement of the nature of the proceeding;
4. A direction that the person cited do appear at a time and place specified.

History: En. Sec. 318, p. 322, L. 1877; re-en. Sec. 318, 2nd Div. Rev. Stat. 1879; re-en. Sec. 318, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2914, C. Civ. Proc. 1895; re-en. Sec. 7705, Rev. C. 1907; amd. Sec. 1, Ch. 40, L. 1921; re-en. Sec. 10359, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1707.

References

State v. District Court, 73 M 84, 90, 235 P 751.

42 Am. Jur. 11, Process, §§ 9 et seq.

Summons as amendable to cure error or omission in naming or describing court or judge, or place of court's convening. 154 ALR 1019.

91-4306. (10360) Citation—how issued. The citation may be issued by the clerk upon the application of any party, without an order of the judge,

except in cases in which such order is by the provisions of this Title expressly required.

History: En. Sec. 319, p. 323, L. 1877; re-en. Sec. 319, 2nd Div. Rev. Stat. 1879; re-en. Sec. 319, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2915, C. Civ. Proc. 1895; re-en. Sec. 7706, Rev. C. 1907; re-en. Sec. 10360, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1708.

91-4307. (10361) Citation—how served. The citation must be served in the same manner as a summons in a civil action.

History: En. Sec. 320, p. 323, L. 1877; re-en. Sec. 320, 2nd Div. Rev. Stat. 1879; re-en. Sec. 320, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2916, C. Civ. Proc. 1895; re-en. Sec. 7707, Rev. C. 1907; re-en. Sec. 10361, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1709. be served as a citation, which in turn must be served as a summons; therefore, since a summons cannot be served by a party to the proceeding, service made by petitioner for letters of guardianship was void. *State v. District Court et al.*, 73 M 84, 90, 235 P 751.

Operation and Effect

The notice required by sec. 91-4701 to be served upon a person sought to be placed under guardianship as an incompetent must

References

O'Sullivan v. Alexander et al., 73 M 12, 18, 234 P 1099.

91-4308. (10362) Personal notice given by citation. When personal notice is required, and no mode of giving it is prescribed, it must be given by citation.

History: En. Sec. 321, p. 323, L. 1877; re-en. Sec. 321, 2nd Div. Rev. Stat. 1879; re-en. Sec. 321, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2917, C. Civ. Proc. 1895; re-en. Sec. 7708, Rev. C. 1907; re-en. Sec. 10362, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1710.

References

State v. District Court et al., 73 M 84, 90, 235 P 751.

91-4309. (10363) Citation to be served five days before return. When no other time is specifically prescribed in this Title citations must be served at least five days before the return day thereof.

History: En. Sec. 322, p. 323, L. 1877; re-en. Sec. 322, 2nd Div. Rev. Stat. 1879; re-en. Sec. 322, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2918, C. Civ. Proc. 1895; re-en. Sec. 7709, Rev. C. 1907; re-en. Sec. 10363, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1711.

References

State v. District Court et al., 73 M 84, 90, 235 P 751.

91-4310. (10364) One description of real estate sought to be sold, being published, is sufficient for all purposes. When a complete description of the real property of an estate sought to be sold has been given and published in a newspaper, as required in the order to show cause why the sale should not be made, such description need not be published in any subsequent notice of sale, or notice of petition for the confirmation thereof; it is sufficient to refer to the description contained in the publication of the first notice, as being proved and on file in the court.

History: En. Sec. 323, p. 324, L. 1877; re-en. Sec. 323, 2nd Div. Rev. Stat. 1879; re-en. Sec. 323, 2nd Div. Comp. Stat. 1887;

re-en. Sec. 2919, C. Civ. Proc. 1895; re-en. Sec. 7710, Rev. C. 1907; re-en. Sec. 10364, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1712.

91-4311. (10365) Rules of practice generally. Except as otherwise provided in this Title, the provisions of Title 93 are applicable to and constitute the rules of practice in the proceedings mentioned in this Title.

History: En. Sec. 324, p. 324, L. 1877; re-en. Sec. 324, 2nd Div. Rev. Stat. 1879; re-en. Sec. 324, 2nd Div. Comp. Stat. 1887;

re-en. Sec. 2920, C. Civ. Proc. 1895; re-en. Sec. 7711, Rev. C. 1907; re-en. Sec. 10365, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1713.

Operation and Effect

An issue in a probate matter is to be tried and determined as an ordinary action, except that a jury trial is a privilege, and not a matter of right. In re Estate of Peterson, 49 M 96, 97, 140 P 237.

As against the contention of appellant that an answer was necessary to objections to a petition for appointment of an administrator in a probate proceeding under the rules of practice provided for in this section, held, that this section specifically provides that those rules of practice only apply when no other provision as to practice and procedure is contained in the provisions as to the probate of estates, and a reading of secs. 91-1504 and 91-1505 clearly indicates that the contesting application and petition must be heard together,

and no pleading in the nature of an answer is required. In re Mapes' Estate, 112 M 549, 555, 118 P 2d 755.

References

Cited or applied as sec. 2920, Probate Practice Act, in State ex rel. Nissler v. Donlan, 32 M 256, 263, 80 P 244; as sec. 7711, Revised Codes, in In re Estate of Murphy, 57 M 273, 280, 188 P 146; State ex rel. Juekem v. District Court, 57 M 315, 188 P 137; In re Sprigg's Estate, 68 M 92, 95, 216 P 1108; State v. District Court, 83 M 400, 410, 272 P 525; State ex rel. O'Neil v. District Court et al., 96 M 393, 396 et seq., 30 P 2d 815; State ex rel. Stimatz v. District Court, 105 M 510, 515, 74 P 2d 8; State ex rel. Haynes v. District Court, 106 M 578, 584, 81 P 2d 422.

91-4312. (10366) New trials and appeals. The provisions of Title 93 relative to new trials and appeals—except in so far as they are inconsistent with the provisions of this Title—apply to the proceedings mentioned in this Title.

History: En. Sec. 325, p. 324, L. 1877; re-en. Sec. 325, 2nd Div. Rev. Stat. 1879; re-en. Sec. 325, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2921, C. Civ. Proc. 1895; re-en. Sec. 7712, Rev. C. 1907; re-en. Sec. 10366, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1714.

Operation and Effect

In the absence of specific provisions, in the Code of Civil Procedure, relating to new trials and appeals in probate proceedings as to the contents of the record in such cases, or the mode of authenticating it, the provisions regulating bills of exceptions, statements, and appeals in ordinary actions are applicable, and, so far as may be, the analogies between them must govern. In re Dougherty's Estate, 34 M 336, 341, 86 P 38.

New trials in probate proceedings are proper only in cases involving issues of fact which are based upon formal pleadings authorized by the codes. In re Antonioli's Estate, 42 M 219, 221, 111 P 1033; State ex rel. Culbertson Ferry Co. v. District Court, 49 M 595, 598, 144 P 159.

Where formal pleadings authorized or required by the statute in a probate proceeding, no matter how denominated, present issues of fact, a new trial lies even though the proceeding was disposed of solely upon a question of law. In re

Stinger Estate, 61 M 173, 183, 184, 201 P 693.

Order Denying a New Trial of Objections to An Executor's Final Account and His Petition for Distribution not Appealable

In view of subd. 2 of sec. 93-8003, by which the legislature omitted orders denying new trials from the list of appealable orders, of sec. 93-8017 expressly abolishing appeals from such orders, and of this section making the latter provision applicable to probate proceedings, an appeal from an order denying a new trial of objections to an executor's final account and his petition for distribution of the estate does not lie. In re Sullivan's Estate, 112 M 519, 524, 118 P 2d 383.

References

Cited or applied as sec. 2921, Code of Civil Procedure, in Tuohy's Estate, 23 M 305, 307, 58 P 722; In re Davis' Estate, 27 M 235, 241, 70 P 721; In re Kelly's Estate, 31 M 356, 359, 78 P 579, 79 P 244; as sec. 7712, Revised Codes, in In re Estate of Murphy, 57 M 273, 280, 188 P 146; In re Roberts' Estate, 102 M 240, 258, 58 P 2d 495; State ex rel. Stimatz v. District Court, 105 M 510, 515, 74 P 2d 8; In re Blankenbaker's Estate, 108 M 383, 384, 91 P 2d 401.

91-4313. (10367) Within what time appeal must be taken. The appeal must be taken within sixty days after the order or judgment is entered.

History: En. Sec. 326, p. 324, L. 1877; re-en. Sec. 326, 2nd Div. Rev. Stat. 1879; re-en. Sec. 326, 2nd Div. Comp. Stat. 1887;

re-en. Sec. 2922, C. Civ. Proc. 1895; re-en. Sec. 7713, Rev. C. 1907; re-en. Sec. 10367, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1715.

Time Required No Reason for Issuance of Writ

Since under this section an appeal from a judgment in a will contest must be taken within sixty days after its entry, contention of petitioner for a writ of supervisory control to review action of probate court in rejecting a special finding of the jury, that appeal would not afford adequate relief because of the time required to take it, held not meritorious. *State ex rel. Fushong v. District Court*, 105 M 37, 41, 69 P 2d 119.

References

Cited or applied as sec. 7713, Revised

Codes in *In re Estate of Murphy*, 57 M 273, 277, 188 P 146; *In re Roberts' Estate* 102 M 240, 258, 58 P 2d 495; *State ex rel. Stimatz v. District Court*, 105 M 510, 515, 74 P 2d 8.

3 Am. Jur. 139, Appeal and Error, §§ 417 et seq.

Power of trial court indirectly to extend time for appeal. 89 ALR 941.

Failure, due to fraud, duress, or misrepresentation by adverse parties, to file notice of appeal within prescribed time. 149 ALR 1261.

91-4314. (10368) Issues joined—how tried and disposed of. All issues of fact joined in probate proceedings must be tried in conformity with the requirements of sections 91-901 to 91-907, and in all such proceedings the party affirming is plaintiff, and the one denying or avoiding is defendant. Judgments therein, on the issue joined, as well as for costs, may be entered and enforced by execution or otherwise, by the court or judge, as in civil actions.

History: En. Sec. 327, p. 325, L. 1877; re-en. Sec. 327, 2nd Div. Rev. Stat. 1879; re-en. Sec. 327, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2923, C. Civ. Proc. 1895; re-en. Sec. 7714, Rev. C. 1907; re-en. Sec. 10368, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1716.

References

Cited or applied as sec. 2923, Code of Civil Procedure, in *In re Liter's Estate*,

19 M 474, 477, 48 P 753; *In re Davis' Estate*, 27 M 235, 241, 70 P 721; *In re Tuohy's Estate*, 33 M 230, 241, 83 P 486; as sec. 7714, Revised Codes, in *In re Estate of Peterson*, 49 M 96, 97, 140 P 237; *In re Estate of Murphy*, 57 M 273, 280, 188 P 146; *In re Stinger Estate*, 61 M 173, 184, 201 P 693; *In re Harper's Estate*, 98 M 356, 40 P 2d 51.

91-4315. (10369) Court to try case when no jury demanded—how and what issues to be tried. If no jury is demanded, the court or judge must try the issues joined. If, on written demand, a jury is called by either party, and the issues are not sufficiently made up by the written pleadings on file, the court or judge, on due notice to the opposite party, must settle and frame the issues to be tried, and submit the same, together with the evidence of each party, to the jury, on which they must render a verdict. Either party may move for a new trial upon the same grounds and errors, and in like manner, as provided in this code for civil actions. If the trial of the issues joined requires the examination of an account, the court or judge must try the matter or refer it, and no jury can be called.

History: En. Sec. 328, p. 325, L. 1877; re-en. Sec. 328, 2nd Div. Rev. Stat. 1879; re-en. Sec. 328, 2nd Div. Comp. Stat. 1887; amd. Sec. 2924, C. Civ. Proc. 1895; re-en. Sec. 7715, Rev. C. 1907; re-en. Sec. 10369, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1717.

Operation and Effect

Where objectors to the allowance of an attorney's fee for services rendered and administrator did not demand a jury trial, they were in no position to complain on appeal that the court tried the cause with-

out a jury. *In re McLure's Estate*, 68 M 556.

In a proceeding instituted under sec. 91-4201 by testamentary trustees praying for settlement of their accounts, objecting *cestuis que trustent* were not entitled to trial by jury. *In re Harper's Estate*, 98 M 356, 361, 40 P 2d 51.

References

Cited or applied as sec. 2924, Code of Civil Procedure, in *In re Davis' Estate*, 27 M 235, 241, 70 P 721; *In re Tuohy's*

Estate, 33 M 230, 242, 83 P 486; as sec. Peterson, 49 M 96, 97, 140 P 237; In re 7715, Revised Codes, in In re Estate of Stinger Estate, 61 M 173, 184, 201 P 693.

91-4316. (10370) Court to appoint attorney for minor or absent heirs, devisees or legatees or creditors—when, and what compensation he is to receive. At or before the hearing of petitions and contests for the probate of wills; for letters testamentary or of administration; for sales of real estate, and confirmation thereof; settlements, partitions, and distributions of estate, setting apart homesteads, and all other proceedings where all the parties interested in the estate are required to be notified thereof; the court or judge may, in its or his discretion, appoint some competent attorney-at-law to represent in all such proceedings the devisees, legatees, or heirs, or creditors of the decedent, who are minors and have no general guardian in the county, or who are nonresidents of the state; and those interested who, though they are neither such minors nor nonresidents, are unrepresented. The order must specify the names of the parties, so far as known, for whom the attorney is appointed, who is thereby authorized to represent such parties in all such proceedings had subsequent to his appointment. The attorney may receive a fee, to be fixed by the court or judge, for his services, which must be paid out of the fund of the estate as necessary expenses of administration, and upon distribution may be charged to the party represented by the attorney. If, for any cause, it becomes necessary, the court or judge may substitute another attorney for the one first appointed, in which case the fee must be apportionately divided. The nonappointment of an attorney will not affect the validity of any of the proceedings.

History: En. Sec. 329, p. 325, L. 1877; re-en. Sec. 329, 2nd Div. Rev. Stat. 1879; re-en. Sec. 329, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2925, C. Civ. Proc. 1895; re-en. Sec. 7716, Rev. C. 1907; re-en. Sec. 10370, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1718.

Operation and Effect

The provisions of this section being exclusive and applicable only to probate proceedings, minors cannot appear by guardian ad litem in opposition to the probate of a will. State ex rel. Eakins v. District Court, 34 M 226, 229, 85 P 1022.

The district court, in its discretion, may, in probate proceedings, appoint an attorney for minor heirs. State ex rel. Cotter v. District Court, 34 M 306, 307, 87 P 615.

Where No Prescribed Proceedings Pending—Error

Where no one of the proceedings mentioned in the above statute were pending before the court, and foreign heirs were already represented, the courts action in appointing an attorney for the heirs on its own motion was error—there being no necessity for it. And appointments should be terminated when their necessity ceases. State ex rel. Hamilton v. District Court, 102 M 341, 346, 57 P 2d 1227.

References

Hoppin v. Long, 74 M 558, 574, 241 P 636.

91-4317. (10371) Orders setting apart homestead, confirming sale, etc., to be recorded. When an order is made, setting apart a homestead, confirming a sale, making distribution of real property, or determining any other matter affecting the title to real property, a certified copy of the same must be recorded in the office of the county clerk of the county in which the property is situated.

History: En. Sec. 330, p. 325, L. 1877; re-en. Sec. 330, 2nd Div. Rev. Stat. 1879; re-en. Sec. 330, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2926, C. Civ. Proc. 1895; re-en. Sec. 7717, Rev. C. 1907; re-en. Sec. 10371, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1719.

Courts 202 (4) et seq.; Homestead 52, 200 and other particular topics.

21 C.J.S. Courts §§ 309, 310; 40 C.J.S. Homesteads §§ 48, 217-219.

91-4318. (10372) Costs—by whom paid in certain cases. When it is not otherwise prescribed in this Title, the district court, or supreme court on appeal, may, in its discretion, order costs to be paid by any party to the proceedings, or out of the assets of the estate, as justice may require. Execution for costs may issue out of the district court.

History: En. Sec. 331, p. 326, L. 1877; re-en. Sec. 331, 2nd Div. Rev. Stat. 1879; re-en. Sec. 331, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2927, C. Civ. Proc. 1895; re-en. Sec. 7718, Rev. C. 1907; re-en. Sec. 10372, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1720.

Operation and Effect

Speaking generally, costs in probate proceedings are governed by this section. Where it is sought to have costs taxed against an administrator personally, the controlling inquiry is whether he acted in good faith; if so, justice requires that they be paid out of the funds of the estate. In *re Williams' Estate*, 55 M 63, 74, 173 P 790.

Where the supreme court in the disposition of an appeal from an order settling an administrator's account remands the cause with directions to require that officer to file a further account and orders, as it may do under this section, that the costs incident to the appeal shall be paid by the administrator personally, the jurisdiction of the district court is limited to the enforcement of the order, except that it may determine disputed questions of costs, or on final settlement of the account allow such portions of the costs incurred as a charge against the estate as justice may require. In *re Jennings' Estate*, 79 M 73, 76, 78, 254 P 1067.

Under the rule that reasonable attorneys' fees are proper charges against an estate as costs where a will contest is initiated and defended in good faith, and under authority lodged in it in that behalf by this section, the supreme court may, in a proper case, fix the amounts the attorneys for such sides are entitled to for their services on appeal, to be paid out of the assets of the estate. In *re Bielenberg's Estate*, 86 M 521, 529, 284 P 546.

Where it appears that in a proceeding to determine heirship the appeal of unsuccessful claimants was prosecuted in good faith, the district court (as well as the supreme court on appeal) may, in its discretion, under this section, order all costs, including reasonable attorneys' fees, to be paid from the corpus of the estate; counsel for the executor of the estate being entitled to additional compensation for increased labor because of the appeal. In *re Hauge's Estate*, 92 M 36, 45, 9 P 2d 1065.

Attorneys' fees incurred by a devisee under a will to defend a contest thereof are not allowable as costs and disbursements within the purview of sec. 93-8601, nor under sec. 91-1106 and this section, out of the assets of the estate. In *re Baxter's Estate*, 94 M 257, 268, 22 P 2d 182.

Held, on application by the unsuccessful proponents of a will (appellants) for allowance of their costs as a charge against the estate involved, that under this section such costs may be allowed; held, further, that attorney's fees are not allowable out of the assets of the decedent's estate to the unsuccessful proponents of a will to probate, and the supreme court is without authority to order their allowance. (See sec. 91-1106 allowing proponent's costs in a contest after admission of the will to probate.) In *re Mickich's Estate*, 114 M 258, 278, 136 P 2d 223.

References

Cited or applied as sec. 7718, Revised Codes, in *re Williams' Estate*, 52 M 366, 368, 157 P 963; in *re Kesi's Estate*, 117 M 377, 383, 388, 161 P 2d 641.

Costs 12, 224, 279.

20 C.J.S. Costs §§ 9, 295, 343, 389, 422.

91-4319. (10373) Executor, etc., to be removed when committed for contempt. Whenever an executor or administrator or guardian is committed for contempt in disobeying any lawful order of the court or judge, and has remained in custody for thirty days without obeying such order, or purging himself otherwise of the contempt, the court or judge may, by order reciting the facts, and without further showing or notice, revoke his letters and appoint some other person entitled thereto executor or administrator or guardian in his stead.

History: En. Sec. 332, p. 326, L. 1877; re-en. Sec. 332, 2nd Div. Rev. Stat. 1879; re-en. Sec. 332, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2928, C. Civ. Proc. 1895; re-en. Sec. 7719, Rev. C. 1907; re-en. Sec. 10373, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1721.

References

Cited or applied as sec. 7719, Revised Codes, in State ex rel. King v. District Court, 42 M 182, 185, 111 P 717.

Executors and Administrators 35 (1).
33 C.J.S. Executors and Administrators § 90.

91-4320. (10374) Service of process on guardian. Whenever an infant, insane, or incompetent person has a guardian of his estate residing in this state, personal service upon the guardian of any process, notice, or order of the court or judge, concerning the estate of a deceased person in which the ward is interested, is equivalent to service upon the ward, and it is the duty of the guardian to attend to the interests of the ward in the matter. Such guardian may also appear for his ward and waive any process, notice, or order to show cause which an adult or a person of sound mind might do.

History: En. Sec. 332, p. 326, L. 1877; re-en. Sec. 332, 2nd Div. Rev. Stat. 1879; re-en. Sec. 332, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2929, C. Civ. Proc. 1895; re-en. Sec. 7720, Rev. C. 1907; re-en. Sec. 10374, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1722.

Courts 202 (1) et seq.; Guardian and Ward 129 et seq.; Insane Persons 95 and other particular topics.

21 C.J.S. Courts §§ 305, 306; 39 C.J.S. Guardian and Ward § 178; 44 C.J.S. Insane Persons § 147.

91-4321. (10375) Termination of life estate or joint tenancy. (1) When the death of a person terminates a life estate or affects a joint tenancy any person interested in the property or in the title thereto, in which such life estate was held, or such joint tenancy existed, may file in the district court of the county in which the property, or some part thereof, is situated, his verified petition, setting forth such facts and particularly describing the property and his interests therein, and naming all persons who claim or might claim an interest therein as personal representative, heir, devisee or legatee of the decedent, so far as known to the petitioner.

(2) The clerk shall thereupon set the petition for hearing by the court and give notice thereof by causing notice of the time and place of hearing to be posted in three public places in the county where the court is held, at least ten (10) days before the hearing and provided the court may order such further, or other, notice to be given, as in his judgment may seem proper.

(3) The court or the judge shall hear such petition, and the evidence offered in support thereof, and if, upon such hearing, it shall appear that such life estate of such deceased person absolutely terminated by reason of his death, or that such joint tenancy was affected by the death of such deceased person, the court or judge shall make an order to that effect, and thereupon a certified copy of such order may be recorded in the office of the county clerk of each county in which any part of the property is situated, and thereafter shall have the same effect as a final order of distribution so recorded.

(4) If no proceeding has been had or is pending to determine whether any inheritance tax is payable by reason of such death, the court or judge may determine in a proceeding under this section whether an inheritance tax is due by reason of the death of such person, and the amount thereof, if any. If it is desired to have the court or judge determine the liability for

inheritance tax, and the amount thereof, appropriate allegations to that effect shall be included in the petition, and a copy of such petition, and notice of the time and place of hearing, shall be mailed to the state board of equalization by the clerk of the court, at least ten (10) days before the date set for hearing.

History: En. Sec. 2930, C. Civ. Proc. 1895; re-en. Sec. 7721, Rev. C. 1907; re-en. Sec. 10375, R. C. M. 1921; amd. Sec. 1, Ch. 130, L. 1943. Cal. C. Civ. Proc. Sec. 1723.

Life Estates—4.
31 C.J.S. Estates § 110 et seq.

91-4322. (10376) Power of clerk to issue orders and notices. The clerk may make all necessary orders and issue notices of hearing for the probate of wills, both domestic and foreign, and letters of administration or guardianship, may order notices to creditors, appoint appraisers, file and approve all bonds, file and approve all claims against the estate, file and approve all accounts of executors, administrators, and guardians, except final accounts, when no objections are made or filed thereto; and in the absence of the judge may hear and upon the hearing grant such letters, including letters testamentary, when no objections are made or filed, and make orders fixing time and place of hearing accounts and petitions for distribution, and may also make orders to show cause on applications for sale of real estate and orders to show cause or for notice of hearing in any probate or guardianship matter for the hearing of which an order to show cause or notice of hearing is necessary. In the absence of the judge and when no objections are made or filed, the clerk may hear, and upon the hearing grant letters of administration or guardianship and letters testamentary, approve all bonds, claims against estates and all accounts of executors, administrators and guardians, except final accounts. The court or judge may at any time within thirty days thereafter set aside or modify any of the orders herein provided for, but unless so set aside or modified, they shall have the same effect as if made by the judge or court.

History: En. Sec. 1, p. 219, L. 1891; amd. Sec. 2931, C. Civ. Proc. 1895; re-en. Sec. 7722, Rev. C. 1907; amd. Sec. 1, Ch. 58, L. 1921; re-en. Sec. 10376, R. C. M.

1921; amd. Sec. 1, Ch. 14, L. 1935; amd. Sec. 1, Ch. 178, L. 1937.

Clerks of Courts—66.
14 C.J.S. Clerks of Courts §§ 35-37.

91-4323. Validation of sales by fiduciaries. All sales by trustees, executors, administrators and guardians which, previous to the effective date of this act, were made to purchasers for a valuable consideration, which consideration has been paid by such purchasers in good faith, and such sales shall not have been set aside by the district or probate court having jurisdiction thereof, shall be sufficient to sustain a trustee's, executor's, administrator's or guardian's deed or conveyance to such purchaser, and, in case such deed or conveyance shall not have been given, shall entitle such purchaser to such deed or conveyance; and such deed or conveyance, if now executed or when executed, shall be sufficient to convey to such purchaser all the title that such beneficiary, decedent or ward had in said real or personal property; and all irregularities in obtaining the order of the court for such sale, and all irregularities or defects in making or conducting such sale by said trustee, executor, administrator or guardian,

shall be disregarded, and such sale shall not be invalidated by reason of any such defect or irregularity.

History: En. Sec. 1, Ch. 207, L. 1947.

CHAPTER 44

INHERITANCE TAX

- Section 91-4401. Taxes on transfer—when and how imposed.
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91-4401. (10400.1) Taxes on transfer—when and how imposed. A tax shall be and is hereby imposed upon any transfer of property, real, personal or mixed, or any interest therein, or income therefrom in trust or otherwise, to any person, association or corporation except the state of Montana, or any of its institutions, county, town or municipal corporations within the state, for strictly county, town, municipal or other public purposes, and corporations of this state organized under its laws, or voluntary associations, organized solely for religious, charitable, or educational purposes, which shall use the property so transferred exclusively for the purposes of their organization, within the state, in the following cases, except as hereinafter provided:

(1) By a resident of state. When the transfer is by will or by intestate laws of this state from any person dying possessed of the property while a resident of the state.

(2) Nonresident's property within state. When a transfer is by will or intestate law, of property within the state or within its jurisdiction and the decedent was a nonresident of the state at the time of his death.

History: This and the seven following sections were originally enacted as Sec. 1, Ch. 65, L. 1923; amended by Sec. 1, Ch. 150, L. 1925; amended by Sec. 1, Ch. 105, L. 1927 and by Sec. 1, Ch. 186, L. 1935, and appeared as Sec. 10400.1, R. C. M. 1935. Earlier act was Ch. 14, Ex. L. 1921, which appeared as Secs. 10377 to 10400, R. C. M. 1921.

Cross-Reference

Disposal of proceeds of tax, sec. 84-1901.

Subd. 3. Does Not Operate Retroactively

Held, that there being nothing in this section et seq., to indicate that the act was intended to operate retroactively, it has no application to transfers made before its enactment; it is a general rule that statutes are intended to operate prospectively only, unless otherwise expressly

stated or clearly and necessarily implied; the presumption is against retroactive operation. (See sec. 12-201.) State ex rel. Blankenbaker v. District Court, 109 M 331, 333, 96 P 2d 936.

Where Evidence Insufficient to Show Transfer in Contemplation of Death

Where ranch lands were deeded by husband to wife, and the deeds placed of record, and the two used their lands together and had a joint bank account in which all proceeds of the ranching operations were placed, each being free to draw checks against the account, evidence held insufficient to show that the transfers were intended to take effect at or after the grantor's death, even though it also appeared that the lands were assessed to grantor and he alone made an income tax return, including income from the deeded lands. State ex rel. Blankenbaker v. District Court, 109 M 331, 338, 96 P 2d 936.

Subd. 7. Annuity Contracts Constitute Insurance

Held, that annuity contracts issued by life insurance companies constitute "insurance," and as such are immune from taxation under this subsection, unless in excess of \$50,000, because of the provisions contained in secs. 40-1301, 40-1302, 66-2003 and 40-1001, and there being nothing in the general statutes relating to life insurance companies repudiating the propriety of classifying annuities as insurance. In re Fligman's Estate, 113 M 505, 506, 129 P 2d 627.

Subd. 8. Where Sale Would Not Reduce Inheritance Tax

In an appeal by the administrator from an order directing the sale of mining claims appraised at \$11,000, based on a petition of the heirs setting forth among other matters that only \$1,000 could be derived therefrom, and such sale would reduce the inheritance tax, held, that nothing would be accomplished by a sale in reducing the amount of the tax because under this section it is computed upon the clear market value of the property passing at the time of death. See also sec. 91-4415. In re Walker's Estate, 111 M 66, 72, 106 P 2d 341.

**In General
Constitutionality**

Held, that this section, imposing an inheritance tax upon all estates of persons who died since April 1, 1921, remaining undistributed on the date of its approval, March 5, 1923, is a valid enactment and not open to attack on the grounds that it violates the equal protection of the law clause of the constitution, is class legislation and authorizes the taking of property without due process of law. State ex rel. Rankin v. District Court, 70 M 322, 324 et seq., 225 P 804.

Id. Sec. 11, art. XII, of the constitution, providing that taxes shall be levied and collected by general laws and for public purposes only, and shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, relates to property taxes only, and not to such as are imposed on inheritance.

Constitutionality as to Estates Not Distributed Since 1921

This section, providing that federal estate taxes paid should be deducted in determining the amount of inheritance tax due, is violative of art. V, sec. 39 of the constitution in including estates of all persons who had died since 1921, not yet distributed, since the constitutional provision prohibits the legislature from re-

mitting or releasing an obligation or liability held by the state except by payment thereof. In re Clark's Estate, 105 M 401, 413, 74 P 2d 401.

Controlling on Deduction of Federal Estate Tax

Held, on contention of the state that secs. 91-4401 and 91-4421 are in pari materia and must be so construed that both may stand, contention not sustainable, the later Act, sec. 91-4401 impliedly repealing the earlier sec. 91-4421, and federal estate taxes paid shall be deducted in arriving at the clear market value of estates for inheritance tax purposes. In re Clark's Estate, 105 M 401, 409, 74 P 2d 401.

Nature of Tax

An inheritance tax is not one on property and there is no natural right to receive property by will or inheritance, it being within power of the state to impose such conditions to succession to property within its jurisdiction as it may deem appropriate, the term "jurisdiction" in this connection meaning power over the particular res or subject. State ex rel. Bankers' Trust Co. v. Walker, 70 M 484, 491 et seq., 226 P 894.

The beneficiary of an estate has no claim by right of blood or otherwise to the estate of a decedent, except as the law gives it to him, and the state may impose such taxes or conditions on distributive shares as it deems proper. Estate of Oppenheimer, 75 M 186, 198, 243 P 589.

Id. The inheritance tax is imposed upon the right to transfer, not upon the estate.

No Obligation on State or Federal Government to Make Deduction of Tax Paid to the Other

Neither the United States nor the state, in determining the estate tax or inheritance tax is under any constitutional obligation to make any deduction on account of the tax of the other; with both, the matter rests in legislative discretion. Inheritance tax is imposed upon the right to receive property which the beneficiary actually receives. It is not a tax on property. In re Clark's Estate, 105 M 401, 429, 74 P 2d 401.

Property Held in Trust not Subject to Tax

Where the owner of property placed it in the name of his wife in trust with the understanding that she would reconvey to him at his request, and she about five months before her death did so, the deed being properly recorded, the husband was at all times the owner and therefore did not acquire the property by inheritance,

thus rendering the re-transfer from wife to husband nontaxable; the husband would not acquire it by inheritance upon termination of the trusteeship by death, since the decedent merely held the record title to the property in trust for another. In re Mayer's Estate, 110 M 66, 69, 99 P 2d 209.

What Transfers or Gifts Taxable

Under this section, held that where a transfer or gift is not to take effect in possession or enjoyment until after the death of the transferor, or donor, whether made in contemplation of death or not, it is subject to the inheritance tax therein provided for. Estate of Oppenheimer, 75 M 186, 198, 243 P 589.

Id. Where under an antenuptial agreement certain sums of money were to be paid to the wife after the death of the husband in certain annual installments by his executors, in consideration of her relinquishment of her right of dower and any other claims she might be entitled to assert against his estate as his widow or next of kin, the total amount of such gifts was subject to the inheritance tax provided for by this section.

Id. For a gift or transfer to escape the imposition of an inheritance tax, it must have been made for a valuable consideration in praesenti.

Held, that under this section, providing for a tax on direct and collateral inheritances, the state may not lawfully collect an inheritance tax upon the right of a nonresident legatee to succeed to shares of the capital stock of a foreign corporation doing business in the state, bequeathed to him by a nonresident, where the certificates representing the stock are kept at the place of domicile of the testator. State ex rel. Bankers' Trust Co. v. Walker, 70 M 484, 491 et seq., 226 P 894.

Id. For the purpose of imposing a succession tax jurisdiction exists only when the exercise of some essential privilege relation to the transfer of title (to stock in a foreign corporation in this instance) depends for its legality upon the law of the state levying the tax.

Id. Shares of stock of a corporation chartered under the laws of another state and belonging to a nonresident are not subject to an inheritance tax in this state.

By enacting chapter 150, laws of 1925, amending this section, (applicable to the case considered) the legislature intended to impose an inheritance tax on the succession or devolution of all real and personal property, of every kind and description, within the jurisdiction of the state, and upon any interest therein (inter alia, upon mortgages), whether owned by a resi-

dent or nonresident at the time of his death. State ex rel. Walker et al. v. Jones, 80 M 574, 582, 261 P 356.

A voluntary transfer of property made "in contemplation of death" and as such taxable under the inheritance tax law as amended (Chap. 105, L. 1927), is one the making of which is induced by the same consideration which leads to a testamentary disposition thereof and as a substitute therefor, i.e., the thought of death, irrespective of whether or not death is believed to be near or imminent. In re Wadsworth's Estate, 92 M 135, 145, 11 P 2d 788.

When Shares of Stock in a Foreign Corporation Not Subject to Tax

Held, that under this section, providing for a tax on direct and collateral inheritances, the state may not lawfully collect an inheritance tax upon the right of a nonresident legatee to succeed to shares of the capital stock of a foreign corporation doing business in the state, bequeathed to him by a nonresident, where the certificates representing the stock are kept at the place of domicile of the testator. State ex rel. Bankers' Trust Co. v. Walker, 70 M 484, 491 et seq., 226 P 894.

Id. For the purpose of imposing a succession tax jurisdiction exists only when the exercise of some essential privilege incident to the transfer of title (to stock in a foreign corporation in this instance) depends for its legality upon the law of the state levying the tax.

Id. Shares of stock of a corporation chartered under the laws of another state and belonging to a nonresident are not subject to an inheritance tax in this state.

References

State ex rel. Walker et al. v. Jones, 80 M 574, 582, 261 P 356; State ex rel. Davis v. State Board of Equalization, 104 M 52, 59, 64 P 2d 1057.

Taxation 865-868, 879 (1, 2), 887, 895 (1, 6).

61 C.J. Taxation §§ 2419, 2421 et seq., 2431, 2434, 2500, 2507 et seq., 2535 et seq., 2591.

Personal property passing under survivorship agreement as subject to succession tax. 3 ALR 1642.

Applicability of succession tax law to antenuptial contracts. 4 ALR 461; 7 ALR 1033; 21 ALR 1338 and 44 ALR 1475.

Deduction of federal estate tax before computing state tax. 7 ALR 714; 16 ALR 702; 23 ALR 849; 31 ALR 992 and 44 ALR 1461.

Estate tax as element in computation of widow's share in estate. 10 ALR 518.

Time as of which value of property is to be computed for purpose of inheritance tax. 13 ALR 127.

Deduction of succession tax paid in other state before computing local succession tax. 23 ALR 852.

Valuation of property for purposes of inheritance tax. 24 ALR 1041 and 57 ALR 1158.

Retrospective operation of succession taxes. 26 ALR 1461.

Tombstone and funeral expenses as deductible items in computation of inheritance or succession tax. 28 ALR 671.

Income during administration as part of value of estate on which succession tax is to be computed. 32 ALR 850.

Succession or estate tax in its application to dower and statutory allowances. 37 ALR 541.

Constitutionality of discrimination in succession tax based on relationship or amount of estate. 39 ALR 504.

Life insurance as affecting transfer or succession tax. 47 ALR 525.

Succession tax on interest of nonresident in partnership business. 60 ALR 569.

Construction of express exemption of charitable organization from succession tax. 62 ALR 336 and 81 ALR 1183.

Entirety estate as subject of succession tax. 69 ALR 766.

Reciprocity provisions of succession tax laws. 69 ALR 949.

Business situs of intangibles in state other than domicile of owner as excluding tax at domicile. 79 ALR 344.

Joint estate in real property as subject to succession tax. 84 ALR 180.

Conditional nature of gift or bequest for public, charitable, or religious uses as preventing deduction in computing estate tax. 107 ALR 801.

Exemption of charitable organization from succession taxes. 108 ALR 297.

Retrospective operation of succession tax. 109 ALR 858.

Construction and effect of provisions of will relied upon as relieving bequest or devise of burden of taxation. 116 ALR 854.

Who must bear succession or estate tax on property covered by power of appointment. 116 ALR 862.

Burden, as between corpus and income, of inheritance, estate, or succession tax. 117 ALR 121.

Valuation of property for purposes of succession or estate tax. 117 ALR 148.

Judicial allowance of claim against decedent's estate as conclusive for purpose of its deduction in computing estate or succession tax. 132 ALR 1464.

Burden of estate tax as affected by a residuary bequest to a religious, educational, or charitable institution. 140 ALR 833.

Succession, inheritance, or estate tax in respect of decedent's interest in partnership. 144 ALR 1134.

Discretion, provided for in will, as to making of charitable bequests, or as to its amount, as affecting its exemption or deduction for purposes of estates, succession or inheritance tax. 149 ALR 1333.

Inheritance tax on property covered by power of appointment. 150 ALR 730.

Entire corpus or only value of reserved interest as taxable, under provision of estate or inheritance tax law relating to transfers intended to take effect at death. 159 ALR 233.

Price paid or received by taxpayer for property as evidence of its value for tax purposes. 160 ALR 684.

Time as of which value of property is to be computed for purpose of inheritance, succession or estate tax. 160 ALR 1333.

91-4402. Transfers in contemplation of death. When the transfer is of property made by a resident or by a nonresident when such nonresident's property is within the state, or within its jurisdiction, by deed, grant, bargain, sale or gift, made in contemplation of the death of the grantor, vendor, or donor, or intended to take effect in possession or enjoyment at or after such death. Every transfer by deed, grant, bargain, sale or gift, made within three years prior to the death of the grantor, vendor or donor, of a material part of his estate, or in the nature of a final disposition or distribution thereof, and without a fair consideration in money or money's worth shall, unless shown to the contrary be deemed to have been made in contemplation of death within the meaning of this section.

History: See history and note to sec. 91-4401.

91-4403. Tax—when imposed. Such tax shall be imposed when any such person or corporation becomes beneficially entitled, in possession or expectancy, to any property or the income thereof, by any such transfer whether

made before or after the passage of this act; provided that the provisions of this act shall apply to all estates of all decedents who have died since the first day of April, 1921, and which estates remain undistributed on the date when this act takes effect, to the same extent and in the same manner as though this act had been in full force and effect at the dates of death of such decedents, and if any tax shall have been paid by any executor, administrator, heir, legatee or devisee of any such decedent before the date when this act takes effect, the amount of such tax so paid shall be allowed as a credit on the total amount of tax required to be paid by such executor, administrator, heir, legatee, or devisee under the provisions of this act.

History: See history and note to Sec.
91-4401.

91-4404. Transfers under power of appointment. Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property, made either before or after the passage of this act, such appointment, when made, shall be deemed a transfer taxable under the provisions of this act, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by such donee by will; and whenever any person or corporation possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a transfer taxable under the provisions of this act, shall be deemed to take place to the extent of such omission or failure, in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related, had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure.

History: See history and note to Sec.
91-4401.

91-4405. Joint estates. Whenever any property, real or personal, is held in the joint names of two or more persons, or as tenants by the entirety, or is deposited in banks or other institutions or depositaries in the joint names of two or more persons and payable to either or the survivor, upon the death of one of such persons, the right of the surviving tenant by the entirety, joint tenant, or joint tenants, person or persons, to the immediate ownership or possession of such property shall be deemed a transfer of one-half or other proper fraction thereof as though the property to which such transfer relates belonged to the tenants by the entirety, joint tenants, or joint depositors as tenants in common, and had been bequeathed or devised to the surviving tenant by the entirety, joint tenant, or joint tenants, person or persons, by such deceased tenant by the entirety, joint tenant, or joint depositor, by will, except such part thereof as may be shown to have originally belonged to the survivor and never to have belonged to the decedent.

History: See history and note to Sec.
91-4401.

91-4406. Insurance part of estate. All insurance payable upon the death of any person over and above fifty thousand dollars (\$50,000.00), shall be deemed a part of the property and estate passing to the person or persons entitled to receive the same and if payable to more than one person the said fifty thousand dollars (\$50,000.00) exemption shall be prorated between such persons in proportion to the amount of insurance payable to each.

History: See history and note to Sec. 91-4401.

91-4407. Tax on clear market value—deductions. The tax so imposed shall be upon the clear market value of such property passing by any such transfer to each person, institution, association, corporation, or body politic, at the rates hereinafter prescribed and only upon the excess of the exemption hereinafter granted to such person, institution, association, corporation or body politic, and in determining the clear market value of the property so passing by any such transfer the following deductions, and no other shall be allowed; debts of the decedent owing at the date of death, expenses of funeral and last illness, all state, county and municipal taxes which are a lien against property situated in this state at the date of death, the ordinary expenses of administration, including the commissions and fees of executors and administrators and their attorneys actually allowed and paid, and federal estate taxes due or paid.

History: See history and note to Sec. 91-4401.

91-4408. Recording date prima facie date of transfer—presumption as to transfers recorded after death. All transfers of property real, personal, or mixed, or of any interest therein, coming within the provisions of this section shall be prima facie proof, for the purposes of this act, to have been made as of the date upon which the papers evidencing such transfer are recorded, and all such transfers, if recorded after the death of the person or persons making such transfer, whatever the form of such transfer, shall be deemed, for the purposes of taxation under the provisions of this act, to have been made by will.

History: See history and note to Sec. 91-4401.

91-4409. (10400.2) Primary rates, where not in excess of \$25,000.00. When the property or any beneficial interest therein passes by any such transfer to any person, institution, association, corporation or body politic, where the amount of the property shall exceed in value the exemption hereinafter specified, and shall not exceed in value twenty-five thousand dollars (\$25,000.00), the tax hereby imposed shall be:

(1) Two per cent. Where the person or persons entitled to any beneficial interest in such property shall be the husband, wife, lineal issue, lineal ancestor of the decedent, or any child adopted as such in conformity with law, or any child to whom such decedent for not less than ten (10) years prior to such transfer stood in the mutually acknowledged relation of a parent, provided, however, such relationship began at or before the child's fifteenth (15) birthday, and was continuous for ten (10) years, or

any lineal issue of such adopted or mutually acknowledged child, at the rate of two per cent. (2%) of the clear value of such interest in such property passing to such person.

(2) Four per cent. Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister or a descendant of a brother or sister of the decedent, a wife of a son, or the husband of a daughter of the decedent, at the rate of four per cent. (4%) of the clear value of such interest in such property passing to such person.

(3) Six per cent. Where the person or persons entitled to any beneficial interest in such property shall be the uncle, aunt or first cousin of the decedent, at the rate of six per cent. (6%) of the clear value of such interest in such property passing to such person.

(4) Eight per cent. Where the person or persons entitled to any beneficial interest in such property shall be in any other degree of collateral consanguinity than is hereinbefore stated, or shall be a stranger in blood to the decedent, or shall be a body politic or corporate, at the rate of eight per cent. (8%) of the clear value of such interest in such property passing to such person, institution, association, corporation or body politic.

History: En. Sec. 2, Ch. 65, L. 1923; amd. Sec. 1, Ch. 48, Ex. L. 1933.

Subd. 1. Adopted Child—Rate of Tax

Where death intervened the approval of the documents for adoption of child, and decedent had taken him into his home and directed his education and remembered him in his will, held, that the court was correct in fixing the inheritance tax at 8 per cent of the property so left as to

a stranger of the blood, instead of at 2 per cent as an adopted child, no contention being made that decedent had for not less than ten years stood in the mutually acknowledged relation of a parent, but it being contended child was legally adopted. In re Clark's Estate, 105 M 401, 425, 74 P 2d 401.

28 Am. Jur. 129, Inheritance, Estate, Succession, and Gift Taxes, §§ 261, 262.

91-4410. (10400.3) Other rates, where in excess of \$25,000.00. The foregoing rates in section 10400.2 are for convenience termed the primary rates:

When the amount of the clear value of such property or interests exceeds twenty-five thousand dollars (\$25,000.00), the rates of tax upon such excess shall be as follows:

(1) Rate where amount \$25,000.00 to \$50,000.00. Upon all in excess of twenty-five thousand dollars (\$25,000.00), and up to fifty thousand dollars (\$50,000.00), two (2) times the primary rates.

(2) Rate where amount \$50,000.00 to \$100,000.00. Upon all in excess of fifty thousand dollars (\$50,000.00), and up to one hundred thousand dollars (\$100,000.00), three (3) times the primary rates.

(3) Rate where amount over \$100,000.00. Upon all in excess of one hundred thousand dollars (\$100,000.00), four (4) times the primary rates.

History: En. Sec. 3, Ch. 65, L. 1923; amd. Sec. 1, Ch. 141, L. 1927; amd. Sec. 2, Ch. 48, Ex. L. 1933.

Taxation—878 (1), 886½, 887, 890, 893, 902.

61 C.J. Taxation §§ 2441 et seq., 2535, 2549, 2582, 2609, 2668 et seq.

91-4411. (10400.3a) Estate tax. (a) In addition to the taxes hereinabove imposed, an estate tax is hereby imposed upon the transfer of all estates which are subject to an estate tax under the provisions of the

United States Revenue Act of 1926, and amendments thereto, where the decedent, at the time of his decease, was a resident of this state. The amount of said estate tax shall be equal to the extent, if any, of the excess of the credit of not exceeding eighty per cent. (80%), allowable under said United States Revenue Act, over the aggregate amount of all estates, inheritance, transfer, legacy and succession taxes paid to any state or territory or the District of Columbia, in respect to any property in the estate of said decedent. Provided, that such estate tax hereby imposed shall in no case exceed the extent to which its payments will effect a saving or diminution in the amount of the United States estate tax payable by, or out of the estate of the decedent, had subdivisions (a) to (h) not been enacted. The tax imposed herein shall be collected by the several county treasurers or the state treasurer and distributed as hereafter provided.

(b) When payable. The estate tax shall be payable to the county treasurer of the county in which such estate is being probated at the same time, or times, at which the United States tax is payable and shall bear interest, if any, at the same rate and for the same period as such United States tax.

(c) Liability. Administrators, executors, trustees and grantees under a conveyance, made during the grantor's life and taxable hereunder, shall be liable for such taxes with interest, until the same have been paid.

(d) Lien. Said taxes and interest shall be, and remain, a lien on the property subject to the taxes until the same are paid.

(e) Extension of time. The district court of the county in which such estate is being probated may, for cause shown, extend the time of payment of said tax whenever the circumstances of the case require.

(f) Duplicate returns. It shall be the duty of the legal representative of the estate of any decedent, who was a resident of this state at the time of his death and whose estate may be subject to the payment of a United States estate tax, to file duplicates of the United States estate tax returns with the district court of the county in which such estate is being probated. He shall also file with such court a certificate or other evidence from the Bureau of Internal Revenue showing the amount of the United States estate tax as computed by that department. The district court shall hear all parties desiring to be heard with respect to the amount of state estate tax and shall enter an order determining such tax and the amount thereof so due and payable. Any person in interest aggrieved by such determination shall have the same right of rehearing and appeal as is now provided for in the determination of inheritance taxes.

(g) Intent of subdivisions (a) to (h). It is hereby declared to be the intent and purpose of subdivisions (a) to (h) to obtain for this state the benefit of the credit allowed under the provisions of said United States Revenue Act, to the extent that this state may be entitled by the provisions of said act, by imposing additional taxes and the same shall be liberally construed to effect this purpose.

(h) Provisions applicable. The provisions of sections 91-4401 to 91-4456, inclusive, relating to the tax on inheritances and transfers, shall

apply to the taxes imposed by subdivisions (a) to (h), in so far as the same are applicable and not in conflict with the provisions hereof.

History: En. Sec. 2, Ch. 48, Ex. L. 1933; Sec. 10400.3a R. C. M. 1935.

Subd. 3(c). When Administrator Liable to Withhold Tax from Other Property

Section 91-4417 indicates that the administrator's liability is only for the tax on property passing, or which should pass, through his hands, or at most property impressed with a tax lien which he might

seize and sell, but if he has in possession other property passing to the beneficiary who secures the particular property which passed under this subsection, he would be liable for the tax thereon because the tax of the transferee may be charged against the distributive share. In re Powell's Estate, 110 M 213, 218, 101 P 2d 54.

91-4412. Credit allowance on inheritance taxes paid by resident decedents to other states. The tax imposed by sections 91-4401 to 91-4411 shall, as to a resident of the state of Montana who died domiciled in Montana, be credited with the amount of any valid inheritance, estate, legacy or succession taxes actually paid to any state or territory of the United States (other than the state of Montana), or to the District of Columbia. Provided, however, that the amount to be so credited shall in no event exceed that amount which the resident decedent was taxed on that property in Montana.

History: En. Sec. 1, Ch. 236, L. 1943.

91-4413. Exemption of intangible personal property of nonresident decedents, when. The tax imposed by sections 91-4401 to 91-4411, 91-4421 and 91-4425 in respect of personal property, except tangible personal property having an actual situs in this state, shall not be payable:

(1) If the decedent is a resident of a state or territory of the United States which at the time of the transfer did not impose a transfer tax or death tax of any character in respect of personal property of residents of this state, except tangible personal property having an actual situs in that state or territory; or

(2) If the laws of the state or territory of residence of the nonresident decedent at the time of the transfer contained a reciprocal provision under which nonresidents of that state were exempted from transfer tax or death taxes of every character in respect of personal property, except tangible personal property having an actual situs in that state, providing the state or territory of residence of such nonresident decedent allowed a similar exemption to residents of this state.

History: En. Sec. 1, Ch. 3, L. 1945.

91-4414. (10400.4) Exemptions from first \$25,000. The following exemptions from the tax are hereby allowed, the exemption allowed to each person, institution, association, corporation and body politic to be taken out of the first twenty-five thousand dollars passing by any such transfer to such person, institution, association, corporation or body politic:

(1) Transfers totally exempt. All property transferred to the state or any of its institutions, or to municipal corporations within the state for strictly county, city, town, or municipal purposes, or to corporations or voluntary associations of this state organized under its laws solely for religious, charitable, educational or other public purposes, which shall use the property so transferred exclusively for the purpose of their organization within the state, shall be exempt.

(2) \$17,500; \$5,000; \$2,000 exempt, when. Property of the clear value of seventeen thousand five hundred dollars, transferred to the wife, or

five thousand dollars transferred to the husband of the decedent, and two thousand dollars transferred to each of the other persons described in the first subdivision of section 91-4409 shall be exempt. Such exemption to the widow shall include all her statutory dower and other allowances. Any child of the decedent shall be entitled to credit for so much of the tax paid by the widow as applied to any property which shall thereafter be transferred by or from such widow to any such child, provided the widow does not survive said decedent to exceed ten years.

(3) \$500 exempt, when. Property of the clear value of five hundred dollars transferred to each of the persons described in the second subdivision of section 91-4409 shall be exempt.

(4) Property without the state exempt, when. No tax shall be imposed upon any tangible personal property of a resident decedent when such property is located without this state, and when the transfer of such property is subject to an inheritance or transfer tax in the state where located and which tax has actually been paid, secured or guaranteed, provided such property is not without this state temporarily nor for the sole purpose of deposit or safekeeping; and provided the laws of the state where such property is located allow a like exemption in relation to such property left by a resident of that state and located in this state.

History: En. Sec. 4, Ch. 65, L. 1923.

Subd. 2. Widow's \$17,500 Exemption Includes Allowance

In construing this subsection, held, that the \$17,500 exemption allowed the widow of decedent is all she is allowed to take tax-free, and the court erred in fixing the inheritance tax due from an estate by allowing a deduction paid for the widow's allowance from the gross value of the estate. In *re Wilson's Estate*, 102 M 178, 192, 56 P 2d 733.

Exemptions

Inheritance tax law is full and complete

plan without reference to other statutes as to persons taxable, exemptions, and all other essentials, and declaration that exemption "shall include all her statutory dower and other allowances" excludes all other deductions or exemptions; taxation is the rule and exemption is the exception, and burden of proof is on the one claiming exemption. In *re Wilson's Estate*, 102 M 178, 196, 56 P 2d 733.

Taxation \Rightarrow 872-876.

61 C.J. Taxation §§ 2524 et seq., 2526 et seq., 2529, 2530, 2531 et seq.

28 Am. Jur. 99, Inheritance, Estate, Succession, and Gift Taxes, §§ 190 et seq.

91-4415. (10400.5) When payment due—lien of tax—liability for payment—place of payment—receipts—receipt or bond required before final accounting allowed. All taxes imposed by this act shall be due and payable at the time of the death of the decedent, except as hereinafter provided; and every such tax shall be and remain a lien upon the property transferred until paid, and the person to whom the property is transferred and the administrators, executors, and trustees of every estate so transferred shall be personally liable for such tax until its payment.

The tax shall be paid to the state treasurer or to the treasurer of the county in which the district court is situated having jurisdiction as herein provided, and if paid to the county treasurer said treasurer shall make triplicate receipts of such payment, one of which he shall immediately send to the state treasurer, whose duty it shall be to charge the county treasurer so receiving the tax, with the amount thereof, and the other receipt shall be delivered to the executor, administrator, or trustee, whereupon it shall be a proper voucher in the settlement of his accounts. One he shall keep on file in his office.

No executor, administrator, or trustee shall be entitled to a final accounting of an estate, in settlement of which a tax is due under the provisions of this act, unless he shall produce such receipt or a certified copy thereof or unless a bond shall have been filed as prescribed by section 91-4419.

History: En. Sec. 5, Ch. 65, L. 1923.

Personal Liability of Executors and Administrators

Held, that this section, with reference to personal liability of administrators, executors and trustees of estates, for inheritance taxes until payment, is intended to mean personal liability only for the tax on property passing, or which should pass, through the hands of such officers, or at most property impressed with a tax lien, which they might seize and sell in the same manner as they may do for the payment of estate

debts under sec. 91-4417. In re Powell's Estate, 110 M 213, 216, 101 P 2d 54.

References

In re Clark's Estate, 105 M 401, 412, 74 P 2d 401; In re Walker's Estate, 111 M 66, 72, 106 P 2d 341.

Taxation 902, 903.

61 C.J. Taxation §§ 2668 et seq., 2674 et seq.

28 Am. Jur. 140, Inheritance, Estate, Succession, and Gift Taxes, §§ 286 et seq.

91-4416. (10400.6) Discount—interest. If such tax is paid within eighteen months from the accruing thereof, a discount of five per cent. shall be allowed and deducted therefrom. If such tax is not paid within eighteen months from the accruing thereof, interest shall be charged and collected thereon at the rate of ten per cent. per annum from the time the tax accrued; unless by reason of claims made upon the estate, necessary litigation or other unavoidable cause of delay, such tax shall not be determined and paid as herein provided, in which case interest at the rate of six per cent. shall be charged upon such tax from the accrual thereof until the cause of such delay is removed, after which ten per cent. shall be charged, provided that litigation to defeat the payment of the tax shall not be considered necessary litigation. In all cases when a bond shall be given under the provisions of section 91-4419, interest shall be charged at the rate of six per cent. after one year from the date of death, until the date of payment thereof.

History: En. Sec. 6, Ch. 65, L. 1923.

Construction Relating to Ten Per Cent Interest

Provision to exact ten per cent interest if inheritance tax not paid within eighteen months unless necessary litigation or other unavoidable delay intervene in which case it shall be six per cent "provided that litigation to defeat the payment of the tax shall not be considered necessary litigation," held not open to construction that ten per cent shall apply to all litigation, whether justified or successful or not, purpose being to prevent unjustified delay by unnecessary litigation. In re Clark's Estate, 105 M 401, 431, 74 P 2d 401.

Postponement of Payment Due to Litigation

Where litigation over the payment of an inheritance tax is conducted in good faith and plaintiff is even only partially successful, the interest payable on the amount due is only six per cent, not ten per cent. (See In re Clark's Estate, 105 M 401, 74 P 2d 401.) State ex rel. Blankenbaker v. District Court, 109 M 331, 335, 96 P 2d 936.

28 Am. Jur. 141, Inheritance, Estate, Succession, and Gift Taxes, § 292.

91-4417. (10400.7) Powers of representative in collection and payment of tax—collection from legatees or distributees. Every executor, administrator or trustee shall have full power to sell so much of the property of the decedent as will enable him to pay such tax in the same manner as he might be entitled by law to do for the payment of the debts of the testator or

intestate. Any such administrator, executor, or trustee, having in charge or in trust any legacy or property for distribution, subject to such tax, shall deduct the tax therefrom; and within thirty days therefrom shall pay over the same to the county treasurer, as herein provided. If such legacy or property be not in money, he shall collect the tax thereon upon the appraised value thereof, from the person entitled thereto. He shall not deliver or be compelled to deliver any specific legacy or property subject to tax under this law, to any person until he shall have collected the tax thereon. If any such legacy shall be charged upon or payable out of real property, the heir or devisee shall deduct such tax therefrom and pay it to the administrator, executor, or trustee, and the tax shall remain a lien or charge on such real property until paid, and the payment thereof shall be enforced by the executor, administrator, or trustee in the same manner that payment of the legacy might be enforced, or by the attorney-general under section 91-4440. If any such legacy shall be given in money to any such person for a limited period, the administrator, executor, or trustee shall retain the tax upon the whole amount, but if it be not in money, he shall make application to the court having jurisdiction of an accounting by him to make an apportionment if the case require it, of the sum to be paid into the hands of such legatees, and for such further order relative thereto as the case may require.

History: En. Sec. 7, Ch. 65, L. 1923.

Administrator Not Personally Liable for Tax on Insurance Paid Direct

Held, that where a decedent had entered into an annuity contract with an insurance company under which it was agreed that upon his death the payments should be made to his nieces, neither of whom was an heir-at-law or entitled to share in the estate remaining, and the payments were so made, the administrator could not be held personally liable for the tax on such amounts, since he never came into possession of them and could not deduct the amount of the tax from the distributive shares of the heirs-at-law. In re Powell's Estate, 110 M 213, 219, 101 P 2d 54.

Each Legacy Must Bear Own Proportionate Tax

Under this statute, each specific share, interest or legacy passing upon the death of a decedent must bear its proportionate part of the tax, and the share of one beneficiary cannot be used to pay the tax charged against that of another. In re

Powell's Estate, 110 M 213, 219, 101 P 2d 54.

Indicates Personal Liability Limited to Possibility to Enforce Payment

The provisions of this section, giving to executors and administrators power to sell property of estates to pay inheritance taxes, held, to indicate strongly that the legislature contemplated that such officers should be liable personally only in those cases where it was reasonably possible for them, as an incident of their duties in their official capacity, to enforce the payment of the tax from the beneficiaries upon whose right to succeed to the property the tax is based. In re Powell's Estate, 110 M 213, 219, 101 P 2d 54.

Executors and Administrators—110, 137, 272.

33 C.J.S. Executors and Administrators §§ 235, 269, 270, 272, 296; 34 C.J.S. Executors and Administrators §§ 368, 479, 480.

28 Am. Jur. 140, Inheritance, Estate, Succession, and Gift Taxes, §§ 286 et seq.

91-4418. (10400.8) Refunding of tax—when authorized—manner of refunding—advance payment of tax for relief from penalty and interest. If any debt shall be proved against the estate of the decedent, after the payment of any legacy or distributive share thereof, from which any such tax has been deducted, or upon which it has been paid by the person entitled to such legacy or distributive share and such person is required by the order of the district court having jurisdiction of the tax so deducted or paid, to

refund the amount of such debts or any part thereof, an equitable proportion thereof shall be repaid to such person by the executor, administrator or trustee, if the said tax has not been paid to the county treasurer or state treasurer, or by them, in the proper proportionate shares, if it has been so paid.

When any amount of said tax shall have been paid erroneously to the county and state treasurer, or to either of them, it shall be lawful for them, on satisfactory proof to the state board of equalization of such erroneous payment, to refund to the executor, administrator, person or persons who shall have paid any such tax in error, the county's and state's proportionate amount of such tax so paid; provided that all such applications for refund shall be made within two (2) years from the date of such payment.

Any person from whom such tax is or may be due may make an estimate of and pay the same to the clerk of court, who shall receipt therefor, at any time before the same is determined by the court, and shall thereupon be relieved from any interest or penalty upon the amount so paid in the same manner as if the tax were then determined. The money shall be paid to the clerk of the district court who must deposit same with the county treasurer for credit to the clerk of the district court's deposit or trust fund until the correct amount of the tax has been determined. As soon as the correct amount of inheritance tax has been determined, any excess so paid shall be refunded to the person so paying or entitled thereto by such clerk of court out of said trust fund, and the county treasurer shall receipt for the amount of the inheritance tax so determined by the court.

History: En. Sec. 8, Ch. 65, L. 1923; amd. Sec. 1, Ch. 47, L. 1935.

Taxation—904.

61 C.J. Taxation § 2705 et seq.

28 Am. Jur. 144, Inheritance, Estate, Succession, and Gift Taxes, §§ 302 et seq.

Constitutionality of statutes providing for refund of taxes illegal or erroneously exacted. 98 ALR 284.

Permissive or mandatory character of legislation providing for refund of taxes illegally assessed or collected. 103 ALR 817.

Right to amend claim for refund of taxes after time for filing has expired. 113 ALR 1291.

Assignability of claim for tax refund, and rights of assignee in respect thereof. 134 ALR 1202.

91-4419. (10400.9) Bond for deferred payment of tax. Any beneficiary of any property chargeable with a tax under this act, and any executors, administrators and trustees thereof, may elect, within eighteen months from the date of the death of decedent or transfer thereof as herein provided, not to pay such tax until the person or persons beneficially interested therein shall come into the actual possession or enjoyment thereof. The person or persons so electing shall give a bond to the state in a penalty of three times the amount of any such tax, with such sureties as the district court of the proper county or the state board of equalization, as the case may be, may approve, conditioned for the payment of such tax and interest thereon, at such time or period as the person or persons beneficially interested therein may come into the actual possession or enjoyment of such property, which bond shall be filed in the district court, or in the office of the state treasurer as the case may be. Such bond must be executed and filed and a full return of such property upon oath made to the district court within eighteen months from the date of the death of

decedent or transfer as herein provided, and such bond must be renewed every five years, and said deferred tax shall bear interest at six per cent. per annum after such eighteen months.

History: En. Sec. 9, Ch. 65, L. 1923.

References

In re Powell's Estate, 110 M 213, 222,
101 P 2d 54.

91-4420. (10400.10) Bequests to executors or trustees—when taxable.

If a testator bequeaths property to one or more executors or trustees in lieu of their commissions or allowances, or makes them his legatees to an amount exceeding the commissions or allowances prescribed by law for an executor or trustee, the excess in value of the property so bequeathed, above the amount of commissions or allowances prescribed by law in similar cases, shall be taxable by this act.

History: En. Sec. 10, Ch. 65, L. 1923.

91-4421. (10400.11) Payment of tax on transfer of securities by foreign representative—duty of holder of securities or assets of nonresident decedent—apportionment of deductions—information to be given board of equalization—amount of tax to be retained on delivery of assets—penalties. (1)

If a foreign executor, administrator, or trustee shall assign or transfer any stocks, bonds, mortgages, or other securities, in this state, or within the jurisdiction of this state, standing in the name of a decedent or in trust for a decedent, liable to any such tax, the tax shall be paid to the treasurer of the proper county or the state treasurer on the transfer thereof; otherwise the corporation permitting such transfer shall become liable to pay such tax.

(2) No safe deposit company, bank, or other institution, person or persons, holding securities or assets of a nonresident decedent, nor any corporation organized under the laws of this state, in which a nonresident decedent held stock, bonds, mortgages, or other securities, at his decease, shall deliver or transfer the same to the executors, administrators or legal representatives of said decedent, or upon their order or request, unless notice of the time and place of such intended transfer be served upon the state board of equalization at least ten days prior to the said transfer; nor shall any such safe deposit company, bank, or other institution, person or persons, nor any corporation, deliver or transfer any securities or assets of the estate of a nonresident decedent without retaining a sufficient portion or amount thereof to pay any tax which may thereafter be assessed on account of the transfer of such securities or assets under the provisions of the inheritance tax laws, without an order from the proper court authorizing such transfer; and it shall be lawful for the state board of equalization, personally or by representative, to examine said securities or assets at any time before such delivery or transfer. Failure to serve such notice or to allow such examination or to retain a sufficient portion or amount to pay such tax as herein provided, shall render said safe deposit company, trust company, bank, or other institution, person or persons, or such corporation, liable to the payment of the tax due upon said securities or assets in pursuance of the provisions of the inheritance tax laws. The state board of equalization may issue a certificate authorizing the

transfer of any such stock, securities or assets whenever it appears to the satisfaction of the said board that no tax is due thereon.

(3) Whenever a tax may be due from the estate, or the beneficiaries therein, of any resident or nonresident decedent upon the transfer of any property, when the property or the estate left by such decedent is partly within and partly without this state, or upon any stocks, bonds, mortgages, or other securities representing property or estate partly within and partly without this state, any beneficiary of such estate shall be entitled to deduct only his proper proportion of that portion of the total debts and expenses of administration which the gross estate in Montana or within its jurisdiction bears to the gross estate both within and without this state, but no deduction shall be made for any federal estate, inheritance, succession or transfer taxes paid to the United States. As to his Montana exemption, each beneficiary shall be entitled to deduct only that portion represented by the ratio between his interest in the property in this state or within its jurisdiction and his interest in the entire estate.

(4) The state board of equalization shall require such reports and information and shall make such orders, rules, and regulations as it may deem necessary to enable the said board to secure the necessary information from domestic corporations, and to ascertain the amount of and collect such tax; and no holding company or other corporation subject to the provisions of this section shall deliver or transfer any such stocks, bonds, mortgages, or other securities of a Montana corporation without retaining a sufficient portion thereof to pay any tax which may thereafter be assessed under the provisions of this act on account of such transfer, except upon order of the proper court or a certificate of consent of the state board of equalization.

(5) Any corporation or holding company violating the provisions of this section shall be liable to the state for the amount of the tax together with a penalty of ten per centum (10%) thereof.

History: En. Sec. 11, Ch. 65, L. 1923; amd. Sec. 2, Ch. 150, L. 1925; amd. Sec. 2, Ch. 105, L. 1927; amd. Sec. 1, Ch. 130, L. 1929.

Not Controlling on Federal Estate Tax Deduction

Held, on contention of the state that secs. 91-4401 and 91-4421 are in *pari materia* and must be so construed that both may stand, contention not sustainable, the later act, sec. 91-4401 impliedly repealing the earlier sec. 91-4421, and federal estate taxes paid shall be deducted in arriving at the clear market value of estates for inheritance tax purposes. In *re Clark's Estate*, 105 M 401, 409, 74 P 2d 401.

When Shares of Stock in a Foreign Corporation Not Subject to Tax

Held, that under this section, providing for a tax on direct and collateral inheritances, the state may not lawfully collect

an inheritance tax upon the right of a nonresident legatee to succeed to shares of the capital stock of a foreign corporation doing business in the state, bequeathed to him by a nonresident, where the certificates representing the stock are kept at the place of domicile of the testator. *State ex rel. Bankers' Trust Co. v. Walker*, 70 M 484, 491 et seq., 226 P 894.

Taxation—870, 889, 893, 895 (7), 903.

61 C.J. *Taxation* §§ 2546, 2591 et seq., 2599 et seq., 2609, 2674 et seq.

Succession tax on deposit in local bank belonging to estate of nonresident. 42 ALR 363; 60 ALR 567; 65 ALR 1008; 72 ALR 1310 and 86 ALR 760.

Succession tax at domicile of debtor for corporation as to corporate stock of bonds belonging to the estate of a nonresident. 60 ALR 565; 65 ALR 1008; 72 ALR 1310; 77 ALR 1411 and 86 ALR 760.

91-4422. (10400.12) Retroactive nature of act. This act is hereby expressly declared to be retroactive and shall apply to all estates where the

decedent died on or after the first day of June, 1924, and which estates remain undistributed on the date when this act is passed and approved.

History: En. Sec. 2, Ch. 130, L. 1929.

Taxation⌚861.

61 C.J. Taxation §§ 2352, 2390.

91-4423. (10400.13) Jurisdiction of district court—certificate of board required before distributing estate. The district court of every county of the state having jurisdiction to grant letters testamentary or of administration upon the estate of a decedent whose property is chargeable with any tax under the inheritance tax laws, or to appoint a trustee of such estate or any part thereof, or to give ancillary letters thereon, shall have jurisdiction to hear and determine all questions arising under the provisions of the inheritance tax laws, and to do any act in relation thereto authorized by law to be done by a district court in other matters or proceedings coming within its jurisdiction; and if two or more district courts shall be entitled to exercise any such jurisdiction, the district court first acquiring jurisdiction hereunder, shall retain the same to the exclusion of every other district court.

Before decree of distribution in any estate shall be issued by the district judge, or the issuance of an order discharging the executor, administrator or trustee of any estate, there shall be filed with the clerk of the district court a certificate signed by the state board of equalization stating that the amount of inheritance tax determined to be due to the state of Montana, as appearing in the order of the court determining tax, has been properly computed, or if no tax is due such certificate shall so state.

History: En. Sec. 12, Ch. 65, L. 1923; amd. Sec. 3, Ch. 150, L. 1925.

ministrators⌚314 (3); Taxation⌚900 (5).

21 C.J.S. Courts § 492; 34 C.J.S. Executors and Administrators §§ 515, 518, 1517; 61 C.J. Taxation § 2639 et seq.

Courts⌚475 (14); Executors and Ad-

91-4424. (10400.14) Repealed—Chapter 50, laws of 1947.

91-4425. (10400.15) Determination of tax due from estate of nonresident decedent—application—appeals. (1) Any personal representative, trustee, heir, devisee or legatee of a nonresident decedent leaving no estate requiring administration in this state, desiring to transfer any stocks, bonds, mortgages or other securities, or other personal property in this state or within the jurisdiction of this state, may make application to the state board of equalization for the determination whether there is any tax due upon account of the transfer thereof, and the amount of any such tax, and such applicant shall furnish to the state board of equalization therewith, an affidavit setting forth a description and statement of the property owned by the decedent situated within this state, or within its jurisdiction at the time of his death, the true value of said property at the time of decedent's death; a description and statement of the true value of all property owned by the decedent at the time of his death situated outside of this state, and without its jurisdiction; and containing a schedule or statement of all valid claims against the estate of the decedent, including the expenses of his last illness, funeral expenses and expenses of administering his estate. Such applicant shall also, at the same time, furnish the state board of equalization with a certified copy of the last will of

the decedent, in case he died testate, or an affidavit setting forth the names, ages, and residence of the heirs at law of decedent in case he died intestate, and the proportion of the entire estate of said decedent inherited by each of said persons, and the relation, if any, which each legatee, devisee, heir, or transferee sustained to the decedent, or person from whom the transfer was made. Such affidavit shall be subscribed and sworn to by the personal representative of the decedent, or some other person having knowledge of the facts therein set forth.

(2) The statement contained in any affidavits, statements or schedules as to values, or otherwise, shall not be binding upon the state board of equalization in case they believe the same to be erroneous or untrue. From the information so furnished them and such other information as they may be able to obtain with reference thereto, the state board of equalization shall, with reasonable diligence, proceed to ascertain and determine the amount of tax, if any, due under the provisions of this act, and notify the person making the application of the amount of the tax so ascertained and determined to be due; or in case there is no tax to be paid, the state board of equalization shall issue a consent to the transfer of the property so owned by the decedent.

(3) Any person aggrieved by the determination of the state board of equalization in any matter herein provided for in this section may, within thirty (30) days thereafter, appeal to the district court of Lewis and Clark county, by serving on the state board of equalization a notice in writing setting forth his objections to such determination, and by filing such notice, after so serving the same, in the office of the clerk of such court, and thereupon, and within ten (10) days after the service of such notice on them the state board of equalization shall transmit full and complete copies of all original papers and records which have been filed with them in relation to such application, to the clerk of said district court, and thereupon the said district court shall have jurisdiction of such application and proceeding. Upon ten days' notice given by either the applicant or the state board of equalization, the matter may be brought on for hearing and determination by said court, either in term time or in vacation, at a general or special term of court, or at chambers, as may be directed by the order of the court.

History: En. Sec. 12, Ch. 65, L. 1923; amd. Sec. 3, Ch. 150, L. 1925.

Succession tax at domicile of decedent as to personal property located elsewhere or the obligations of nonresidents or foreign corporations. 42 ALR 327.

Succession tax at domicile of debtor as to credit belonging to the estate of a nonresident. 42 ALR 354.

Succession tax on deposit in local bank belonging to estate of nonresident. 42 ALR 363; 60 ALR 567; 65 ALR 1008; 72 ALR 1310 and 86 ALR 760.

Succession tax in state or country in which personal property (or evidence thereof), belonging to the estate of a nonresident decedent is found. 42 ALR 378.

Doctrine of equitable conversion as affecting succession tax as to real property situated in a state or country other than the domicile. 42 ALR 426.

Succession tax at domicile of debtor or corporation as to corporate stock or bonds, belonging to the estate of a nonresident. 60 ALR 565; 65 ALR 1008; 72 ALR 1310; 77 ALR 1411 and 86 ALR 760.

91-4426. (10400.16) Determination when application not made. Whenever any nonresident decedent, leaving no estate requiring administration in this state, shall leave any stocks, bonds, mortgages, or other securities, or

other personal property within the state or within the jurisdiction thereof, and no personal representative, trustee, heir, devisee, or legatee of such nonresident decedent has made application to the state board of equalization for the determination as to whether there is any tax due for the transfer thereof and the amount of such tax, if any, the state board of equalization, upon such matter being called to its attention, shall make an order, and cause a copy thereof to be served upon the personal representative, trustee, heirs, devisees or legatees of such nonresident decedent, ordering and directing that a statement and return, under oath, containing the statements and information prescribed in section 91-4425, be filed with such board within sixty (60) days from the date of such order, or within such further time as the state board of equalization may grant therefor; and if such statement is not filed with the state board of equalization within such time the state board of equalization may then procure such information in any manner it may deem advisable. Upon the filing of such statement, or the procuring of such information by the state board of equalization in the event of a failure to file the same in compliance with such order, the state board of equalization shall proceed in the same manner as prescribed by section 91-4425, and all provisions thereof with reference to hearings and appeals shall be applicable thereto.

History: En. Sec. 12, Ch. 65, L. 1923; Taxation 892.
amd. Sec. 3, Ch. 150, L. 1925. 61 C.J. Taxation § 2609 et seq.

91-4427. (10400.17) Special appraiser. The district court, upon the application of any interested party, including the state board of equalization, shall appoint a competent person as special appraiser to fix the fair market value at the time of the transfer thereof of the property of persons whose estate shall be subject to the payment of any tax imposed by this act.

History: En. Sec. 13, Ch. 65, L. 1923; Taxation 895 (2).
amd. Sec. 2, Ch. 141, L. 1927. 61 C.J. Taxation § 2622 et seq.

References

In re Walker's Estate, 111 M 66, 72, 106
P 2d 341.

91-4428. (10400.18) Duties, powers and compensation of appraisers. Every such appraiser shall forthwith give notice by mail to all persons known to have a claim or interest in the property to be appraised, including the state board of equalization, and to such persons as the district court may by order direct, of the time and place when he will appraise such property. He shall, at such time and place, appraise the same at its fair market value, as herein prescribed; and for that purpose the said appraiser is authorized to issue subpoenas and to compel the attendance of witnesses before him and to take the evidence of such witnesses under oath concerning such property and the value thereof; and he shall make report thereof and of such value in writing, to the said district court, together with the depositions of the witnesses examined, and such other facts in relation thereto and to the said matter as the said district court may order or require. Every appraiser shall be paid on the certificate of the district court at the rate of not to exceed ten dollars (\$10.00) per day for every day actually and necessarily employed in such appraisal, and shall receive

his actual and necessary traveling expenses, and witnesses shall be allowed the same fees as are allowed witnesses in civil actions in courts of record and the same shall be paid by the executor, administrator or trustee of such estate in the same manner as provided for the payment of other administration expenses.

History: En. Sec. 14, Ch. 65, L. 1923;
amd. Sec. 4, Ch. 150, L. 1925.

References

In re Walker's Estate, 111 M 66, 72, 106
P 2d 341.

91-4429. (10400.19) Hearing by the court. The report of the special appraiser shall be made in triplicate, and not less than ten (10) days before the hearing thereon one of said triplicates shall be filed in the office of the district court, one to the administrator or the executor, and the other shall be mailed to the state board of equalization. At the time and place of hearing the administration account the district court shall examine such report, and from the report and other proofs relating to any such estate shall forthwith determine the cash value of such estate and the amount of tax to which the same is liable; or, the district court without appointing such appraiser may at the time so fixed hear the evidence and determine the cash value of such estate and the amount of tax to which the same is liable.

History: En. Sec. 15, Ch. 65, L. 1923;
amd. Sec. 5, Ch. 150, L. 1925; amd. Sec.
5, Ch. 141, L. 1927.

91-4430. (10400.20) Notice of hearing. Notice of such hearing to determine the inheritance tax shall be given in the same manner and may be included in the notice of hearing the administration account as provided by law. Notice in writing of such hearing shall be mailed to the state board of equalization not less than ten (10) days before such hearing upon such blanks and containing such information as the state board of equalization may provide.

History: En. Sec. 15, Ch. 65, L. 1923;
amd. Sec. 5, Ch. 150, L. 1925; amd. Sec. 5,
Ch. 141, L. 1927.

91-4431. (10400.21) Commissioner of insurance to value future estates, etc. The commissioner of insurance shall, on application of any district court or of the state board of equalization, determine the value of any such future or contingent estates, income, or interests therein limited, contingent, dependent, or determinable upon the life or lives of the person or persons in being, upon the facts contained in the district court's finding and determination and contained in such special appraiser's report, and upon the facts certify the same to the district court or to the state board of equalization, and his certificate shall be presumptive evidence that the method of computation adopted therein is correct.

History: En. Sec. 15, Ch. 65, L. 1923;
amd. Sec. 5, Ch. 150, L. 1925; amd. Sec. 5,
Ch. 141, L. 1927.

91-4432. (10400.22) Appraisal at clear market value at time of death—time of appraisal—computing value of future interests. Whenever a transfer of property is made upon which there is, or in any contingency there

may be, a tax imposed, such property shall be appraised at its clear market value existing at the date of death of the transferor, which appraisement shall be made as soon thereafter as practicable. The value of every future or limited estate, income, interest, or annuity dependent upon any life or lives in being, shall be determined by the rule, method, and standard of mortality and value employed by the commissioner of insurance of the state of Montana, in ascertaining the value of policies of life insurance and annuities for the determination of liabilities of life insurance companies, except that the rate of interest for making such computation shall be five per cent (5%) per annum. The tax so determined shall be construed to be upon the transfer of a proportion of the principal or corpus of the estate equal to the present value of such future or limited estate, income, interest or annuity, and not upon any earnings or income of said property produced after death. Such tax shall be due and payable forthwith, except as otherwise provided in this act. This act is hereby declared to be retroactive and shall apply to all estates where the decedent died on or after the first day of June, 1945, and which estates remain undistributed on the date when this act is passed and approved.

History: En. Sec. 15, Ch. 65, L. 1923; amd. Sec. 5, Ch. 150, L. 1925; amd. Sec. 5, Ch. 141, L. 1927; amd. Secs. 1 and 2, Ch. 101, L. 1947.

Taxation—896-898.
61 C.J. Taxation §§ 4, 2560, 2572, 2575.
28 Am. Jur. 45, Inheritance, Estate, Succession, and Gift Taxes, §§ 66-68.

91-4433. (10400.23) Contingent encumbrances. In estimating the value of any estate or interest in property to the beneficial enjoyment or possession whereof there are persons or corporations presently entitled thereto, no allowance shall be made in respect of any contingent encumbrance thereon, nor in respect of any contingency upon the happening of which the estate or property or some part thereof, or interest therein, might be abridged, defeated or diminished; provided, however, that in the event of such encumbrance taking effect as an actual burden upon the interest of the beneficiary, or in the event of the abridgment, defeat, or diminution of such estate or property or interest therein as aforesaid, a return shall be made to the person properly entitled thereto of a proportionate amount of such tax in respect of the amount or value of the encumbrance when taking effect or so much as will reduce the same to the amount which would have been assessed in respect to the actual duration or extent of the estate or interest enjoyed. Such return of tax shall be made in the manner provided in section 91-4418.

History: En. Sec. 15, Ch. 65, L. 1923; amd. Sec. 5, Ch. 150, L. 1925; amd. Sec. 5, Ch. 141, L. 1927.

91-4434. (10400.24) Interest determinable by death. Where any property shall, after the passage of this act, be transferred subject to any charge, estate or interest determinable by the death of any person, or at any period ascertainable only by reference to death, the increase of benefit accruing to any person or corporation upon the extinction or determination of such charge, estate or interest shall be deemed a transfer of property taxable under the provisions of this act in the same manner as though the person or corporation beneficially entitled thereto had then acquired such increase

of benefit from the person from whom the title to their respective estate or interest is derived.

History: En. Sec. 15, Ch. 65, L. 1923; Taxation \hookrightarrow 878 (1).
amd. Sec. 5, Ch. 150, L. 1925; amd. Sec. 5, 61 C.J. Taxation § 2441 et seq.
Ch. 141, L. 1927.

91-4435. (10400.25) Tax payable forthwith on contingent estate. When property is transferred in trust or otherwise, and the rights, interests, or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon such transfer at the lowest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this act, and such tax so imposed shall be due and payable forthwith out of the property transferred; provided, however, that on the happening of any contingency or condition whereby the said property or any part thereof is transferred to a person or corporation, which under the provisions of this act is required to pay a tax at a higher rate than the tax imposed, then such transferee shall pay the difference between the tax imposed and the tax at the higher rate, and the amount of such increased tax shall be enforced and collected as provided in this act.

History: En. Sec. 15, Ch. 65, L. 1923; 28 Am. Jur. 46, Inheritance, Estate,
amd. Sec. 5, Ch. 150, L. 1925; amd. Sec. 5, Succession, and Gift Taxes, §§ 67, 68.
Ch. 141, L. 1927.

91-4436. (10400.26) Postponed tax on undiminished value. Estates in expectancy which are contingent or defeasible, and in which proceedings for determination of the tax have not been taken, or where the taxation thereof has been held in abeyance, shall be appraised at their full undiminished clear value when the person entitled thereto shall come into the beneficial enjoyment or possession thereof without diminution for or on account of any valuation theretofore made of the particular estates for purposes of taxation upon which said estates in expectancy may have been limited. Where an estate for life or for years can be divested by the act or omission of the legatee or devisee, it shall be taxed as if there were no possibility of such divesting.

History: En. Sec. 15, Ch. 65, L. 1923; Taxation \hookrightarrow 898.
amd. Sec. 5, Ch. 150, L. 1925; amd. Sec. 5, 61 C.J. Taxation § 2560.
Ch. 141, L. 1927.

91-4437. (10400.27) Order determining tax—contents. Upon the determination by the district court of the value of any estate which is taxable under the inheritance tax laws, and of the tax to which it is liable, an order shall be entered by the court determining the same, which order shall include a statement of (a) the date of death of the decedent, (b) the gross value of the real and personal property of such estate, stating the principal items thereof, (c) the deductions therefrom allowed by the court, (d) the names and relationship of the persons entitled to receive the same, with the amount received by each, (e) the rates and amounts of inheritance tax for which each such person is liable, and the total amount of tax to be paid, (f) a statement of the amount of interest or penalty due, if any. Such order shall be substantially in the form prescribed by the

state board of equalization. A copy of the same shall be delivered or mailed to the county treasurer, the state treasurer, the administrator or executor, and the state board of equalization, and no final judgment shall be entered in such estates until due proof is filed with the court that such copies have been so delivered or mailed, and receipts are filed with such court showing the payment of all such taxes, or proof is filed showing that the bond authorized by section 91-4419 has been given.

History: En. Sec. 15, Ch. 65, L. 1923; amd. Sec. 5, Ch. 150, L. 1925; amd. Sec. 5, Ch. 141, L. 1927.

Executors and Administrators 314 (3); Taxation 895 (3).
34 C.J.S. Executors and Administrators §§ 515, 517, 518; 61 C.J. Taxation § 2622 et seq.

91-4438. (10400.28) Rehearing within sixty days. The attorney general, state board of equalization, public administrator, county attorney, or any person dissatisfied with the appraisalment or assessment and determination of such tax may apply for a rehearing thereof before the district court within sixty (60) days from the fixing, assessing and determination of the tax by the district court as herein provided on filing a written notice which shall state the grounds of the application for a rehearing. The rehearing shall be upon the records, proceedings, and proofs had and taken on the hearing as herein provided unless additional or newly discovered evidence be alleged therefor, and a new trial shall not be had or granted unless specially ordered by the district court.

History: En. Sec. 15, Ch. 65, L. 1923; amd. Sec. 5, Ch. 150, L. 1925; amd. Sec. 5, Ch. 141, L. 1927.

Filing of Motion for Rehearing Does Not Extend Time for Taking Appeal

The filing and pendency of a motion for a rehearing and new trial of an order determining an inheritance tax does not extend the time within which an appeal therefrom may be taken—sixty days after its entry, and if not taken within that time the appeal will be dismissed. In re Blankenbaker's Estate, 108 M 383, 385, 91 P 2d 401.

No Appeal from Order Denying Rehearing or Reappraisalment

An appeal does not lie from an order denying a motion for a rehearing or reappraisalment or a new trial of the issues in a proceeding for the determination of an inheritance tax, the statutes not authorizing it. In re Blankenbaker's Estate, 108 M 383, 384, 91 P 2d 401.

Rehearing Means Reconsideration of Law and Facts

The right of one dissatisfied with a determination of an inheritance tax to a rehearing, granted by this section contemplates a reconsideration of questions

of law as well as of fact; and if the matter of granting or denying a motion therefor be in the discretion of the district court, such discretion held to have been abused under the facts. State ex rel. Blankenbaker v. District Court, 109 M 331, 337, 96 P 2d 936.

Where Writ of Supervisory Control Proper Remedy

Where the executrix of an estate could have appealed from an order of the district court fixing an inheritance tax within sixty days thereafter but instead moved for a rehearing on the ground of newly discovered evidence on the issue whether a transfer of real property had been made by the grantor more than three years before his death, which motion was denied whereas it should have been granted, and the appeal therefrom was dismissed because the order was not appealable, and appeal from original order was useless because the points raised on motion for rehearing could not have been presented on appeal, writ of supervisory control held proper remedy. State ex rel. Blankenbaker v. District Court, 109 M 331, 336, 96 P 2d 936.

Taxation 900 (1).
61 C.J. Taxation § 2639 et seq.

91-4439. (10400.29) Reappraisalment in the district court within one year. Within one year after the entry of an order or decree of the district

court determining the value of an estate and assessing the tax thereon, the attorney general or the state board of equalization may, if he (or they) believes that such appraisal, assessment, or determination has been erroneously, fraudulently or collusively made, make application to the district judge for a reappraisal thereof. The district court to whom such application is made may thereupon appoint a competent person to reappraise such estate. Such appraiser shall possess the powers, be subject to the duties, shall give the notice and receive the compensation provided by sections 91-4428 to 91-4439, inclusive. Such compensation shall be payable by the county treasurer out of any funds he may have on account of any tax imposed under the provisions of this act, upon the certificate of the district judge. The report of such appraiser shall be filed in the office of the clerk of the district court, and thereafter the same proceedings shall be taken and had by and before such district court as herein provided to be taken and had by and before the said court. The determination and assessment of such district court shall supersede the former determination and assessment of such court, and shall be filed in the office of the county treasurer, state treasurer, and state board of equalization.

History: En. Sec. 15, Ch. 65, L. 1923; amd. Sec. 5, Ch. 150, L. 1925; amd. Sec. 5, Ch. 141, L. 1927.

91-4440. (10400.30) Collection of unpaid taxes. If any county treasurer, state treasurer, or the state board of equalization shall have reason to believe that any tax is due and unpaid under the provisions of this act, after the refusal or neglect of any person liable therefor to pay the same, he or they, shall notify the attorney general in writing of such failure or neglect, and the attorney general, if he have probable cause to believe that such tax is due and unpaid, shall apply to the district court for a citation citing the person liable to pay such tax to appear before the court on the day specified, not more than three months from the date of such citation, and show cause why the tax should not be paid. The judge of the district court upon such application and whenever it shall appear to him that any such tax accruing under this act has not been paid as required by law, shall issue such citation, and the service of such citation and the time, manner and proof thereof, and the hearing and determination thereof, shall conform as near as may be to the provisions of the laws governing probate practice of this state, and whenever it shall appear that any such tax is due and payable, and the payment thereof cannot be enforced under the provisions of this act, in said district court, the person or corporation from whom the same is due is hereby made liable to the state for the amount of such tax, and it shall be the duty of the attorney general, in the name of the state, to sue for and enforce the collection of such tax, and it is made the duty of the county attorney of the county to appear for and act on behalf of any county treasurer, who shall be cited to appear before any district court under the provisions of this act.

History: En. Sec. 16, Ch. 65, L. 1923.

References

In re Powell's Estate, 110 M 213, 221, 101 P 2d 54.

28 Am. Jur. 140 et seq., Inheritance, Estate, Succession, and Gift Taxes, §§ 286 et seq.

Right of tax authority to proceed against beneficiary of estate for collection of inheritance, succession, or estate tax. 144 ALR 702.

91-4441. (10400.31) Special administration to determine tax—compensation. When no application for administration of the estate of any deceased person is made within six months after the demise of such person, and such estate appears to come under the provisions of the inheritance tax laws, or when administration has been completed without determining the tax, the public administrator of the proper county, or any person interested in such estate, may make application for such special or general administration as may be necessary for the purpose of the adjustment and payment of such tax, if any, or if no tax is due, for an order determining that fact. In cases arising under this and the following section, the public administrator, if appointed such special administrator, shall be entitled in the discretion of the court to the fees allowed by law to administrators, or to other reasonable compensation, unless it be found that no tax is due.

History: En. Sec. 17, Ch. 65, L. 1923.

Executors and Administrators—3 (1), 488.

33 C.J.S. Executors and Administrators § 5; 34 C.J.S. Executors and Administrators §§ 482, 498.

91-4442. (10400.32) Special administration to determine tax where transfer made in contemplation of death. Where it appears that the estate of a deceased person subject to the inheritance tax laws was transferred in contemplation of the death of the grantor without the adjustment and payment of the inheritance taxes and no application for such adjustment is made within six months after the demise of such grantor, the public administrator of the proper county shall notify the state board of equalization and on its order make application for and shall be entitled to such general or special administration as may be necessary for the purpose of the adjustment and payment of the inheritance taxes provided by law and shall administer such estate the same as other estates are administered as though such estate had not been transferred by the grantor.

History: En. Sec. 17, Ch. 65, L. 1923.

Executors and Administrators—24.

33 C.J.S. Executors and Administrators § 43; 34 C.J.S. Executors and Administrators §§ 1050-1053.

91-4443. (10400.33) Public administrator's duty to investigate concerning tax—compensation. It shall be the duty of the public administrator, under the general supervision of the state board of equalization, and with the assistance of the county attorney, when required by the said board or district judge, to investigate the estates of deceased persons within his county and to appear for and act in behalf of the county and state in the district court in such estates as the court may in its discretion deem necessary, and for such services the public administrator shall be entitled to five per cent. of the gross inheritance tax as determined in each such estate, to be paid by the county treasurer out of the inheritance tax funds upon an order of the district judge, provided that the minimum fee for each such estate shall not be less than five dollars, and that it shall not exceed twenty-five dollars; but in cases of unusual difficulty, in estates of resident decedents, where the tax exceeds five hundred dollars, the district judge

may allow the public administrator such additional compensation as he may deem just and reasonable.

History: En. Sec. 17, Ch. 65, L. 1923.

Taxation 905 (1, 3).

61 C.J. Taxation § 2639 et seq.

91-4444. (10400.34) State board of equalization to supervise inheritance tax. It shall be the duty of the state board of equalization to supervise the administration of, and to investigate and cause to be investigated the administration of the inheritance tax laws, and such particular estates to which the inheritance tax laws apply throughout the various counties of the state, and to cause to be made and filed in its office reports of such investigation together with specific information and facts as to particular estates that may seem to require special consideration and attention by the legal department of the state; but no information so acquired shall, in advance of legal action, be disclosed to anyone except proper officials and persons interested in such estate.

History: En. Sec. 18, Ch. 65, L. 1923;
amd. Sec. 6, Ch. 150, L. 1925.

Taxation 892.

61 C.J. Taxation § 2550 et seq.

91-4445. (10400.35) Powers and duties of the board. The state board of equalization in the conduct of inheritance tax affairs, shall have the same and similar powers and authority for gathering information and making investigations as is conferred by law on said board in the performance of its other duties. The said board shall biennially report to the governor and to the legislature at the opening of the sessions the general result of its labors and investigations in inheritance tax matters during the previous biennial period, together with specific reports of the several counties where the administration of the inheritance tax laws has been lax and unsatisfactory, with such recommendations for action thereon by the legislature as may be deemed advisable and proper.

History: En. Sec. 18, Ch. 65, L. 1923;
amd. Sec. 6, Ch. 150, L. 1925.

91-4446. (10400.36) Powers and duties in nonresident estates. The state board of equalization shall also gather information and make investigations and reports concerning the estates of nonresident decedents within the provisions of the inheritance tax laws, and shall especially investigate the probate and other records for such probable estates without the state and report thereon from time to time to the legal department of the state and to the proper district court for appropriate legal action, but no information so acquired shall, in advance of legal action, be disclosed to anyone except proper officials, and persons interested in such estate.

History: En. Sec. 18, Ch. 65, L. 1923;
amd. Sec. 6, Ch. 150, L. 1925.

91-4447. (10400.37) Duty of the legal department of state. It shall be the duty of the legal department of the state to carry out and enforce the recommendations and directions of the state board of equalization in all matters pertaining to the conduct of inheritance tax affairs; and in every estate in which the amount of inheritance tax collectible shall exceed or probably exceed the sum of one thousand dollars, there shall be no compounding, composition, or settlement of the taxes under the authority con-

ferred by section 91-4451 or otherwise, until the state board of equalization shall have investigated such estate and made a report thereon, nor until the said board consents to such compounding, compromise, or settlement.

History: En. Sec. 18, Ch. 65, L. 1923;
amd. Sec. 6, Ch. 150, L. 1925.

91-4448. (10400.38) Forms and blanks. The state board of equalization shall prescribe such forms and prepare such blanks as may be necessary in inheritance tax proceedings in the district courts of the state; and such blanks shall be printed at the expense of the state and furnished to the district court upon the request of the judge or clerk thereof.

History: En. Sec. 18, Ch. 65, L. 1923; Taxation 893.
amd. Sec. 6, Ch. 150, L. 1925. 61 C.J. Taxation § 2609.

91-4449. (10400.39) Duties of clerks of district courts. It shall be the duty of the clerk of the district court to furnish to the state board of equalization copies of such documents filed in connection with probate matters as said board may require.

History: En. Sec. 18, Ch. 65, L. 1923; Clerks of Courts 67.
amd. Sec. 6, Ch. 150, L. 1925. 14 C.J.S. Clerks of Courts § 38.

91-4450. (10400.40) Quarterly report of county treasurer—payment of tax to state treasurer—interest on unpaid amounts. Each county treasurer shall make a report under oath to the state treasurer, on prior to the 5th days of January, April, July and October of each year, of all taxes received by him under the inheritance tax laws, up to the first day of each of said months, stating for what estate, by whom and when paid. Said report shall be made in duplicate, the original to be mailed to the state treasurer, and the duplicate to the state board of equalization. The form of such report may be prescribed by the state treasurer. He shall at the same time pay the state treasurer all the taxes received by him under the inheritance tax laws and not previously paid into the state treasury, and for all such taxes collected by him and not paid into the state treasury within five days from the time herein required, he shall pay interest at the rate of ten per cent. per annum.

History: En. Sec. 19, Ch. 65, L. 1923; Counties 90.
amd. Sec. 7, Ch. 150, L. 1925. 20 C.J.S. Counties § 143.

91-4451. (10400.41) Composition and compromise. The state board of equalization is authorized to enter into an agreement with the executor, administrator, or trustee of any estate in which remainders or expectant estates have been of such a nature or so disposed and circumstanced that the taxes therein were held not presently payable or where the interests of the legatees or devisees are not ascertainable under the provisions of this act, or whenever a tax is claimed on account of the transfer of any property of a non-resident decedent, and to compound such taxes upon such terms as may be deemed equitable and expedient and to grant discharges to said executors, administrators, or trustees upon the payment of the taxes provided for in such composition, provided, however, that no such composition shall be conclusive in favor of such executors, administrators, or trustees as against the interests of such cestui que trust as may possess either present rights of enjoyment or fixed, absolute, on indefeasible rights of future enjoy-

ment, or of such as would possess such rights in the event of the immediate termination of particular estates, unless they consent thereto either personally when competent or by guardian. Composition or settlement made or effected under the provisions of this section shall be executed in triplicate and one copy shall be filed in the office of the clerk of the district court of the county in which the tax was paid; one copy to be delivered to the executors, administrators, or trustees, who shall be parties thereto, and one copy to be retained by said board.

History: En. Sec. 20, Ch. 65, L. 1923.

Taxation \Rightarrow 899.

61 C.J. Taxation § 2681.

91-4452. (10400.42) **Receipts, copies, recording.** Any person shall be entitled to a receipt from the county treasurer of any county, or the state treasurer, or at his option to a copy of a receipt that may have been given by such county treasurer or state treasurer, for the payment of any tax under this act, under the official seal of such county treasurer, or state treasurer, which receipt shall designate upon whose estate such tax shall have been paid, by whom, and whether in full of such tax. Such receipt may be recorded in the office of the county recorder of the county in which such estate is situate in a book to be kept by him for that purpose, which shall be labeled "transfer tax."

History: En. Sec. 21, Ch. 65, L. 1923.

Taxation \Rightarrow 903.

61 C.J. Taxation § 2674 et seq.

91-4453. (10400.43) **Definitions.** The words "estate" and "property" as used in this act shall be taken to mean the real and personal property or interest therein passing or transferred to individual legatees, devisees, heirs, next of kin, grantees, donees, or vendees, and not as the property or interest therein of the decedent, grantor, donor, or vendor, and shall include all personal property within or without the state. The word "transfer" as used in this act shall be taken to include the passing of property or any interest therein, in possession or enjoyment, present or future, by inheritance, descent, devise, succession, bequest, grant, deed, bargain, sale, gift, or appointment in the manner herein prescribed to each individual or corporation. The word "decedent" as used in this act shall include the testator, intestate, grantor, bargainor, vendor, or donor. "Intangible" or "intangible property" when used in this act without other qualifications, shall be taken to include all moneys, stocks, bonds, notes, securities and credits of all kinds, secured or unsecured. The words "county treasurer," "public administrator" and "county attorney," as used in this act shall be taken to mean the treasurer, public administrator, and county attorney of the county in which the district court has jurisdiction of the proceedings.

History: En. Sec. 22, Ch. 65, L. 1923.

Taxation \Rightarrow 858.

61 C. J. Taxation § 2342 et seq.

91-4454. (10400.45) **Employment of assistants by board and fixing compensation.** The state board of equalization may employ such other persons as experts and assistants as may be necessary to perform the duties that may be required of the board and fix their compensation.

History: En. Sec. 24, Ch. 65, L. 1923.

Taxation \Rightarrow 446½

59 C.J. States § 174; 61 C.J. Taxation §§ 922 et seq., 952 et seq.

91-4455. (10400.46) Hearings by board—witnesses—false testimony as perjury—compensation. Oaths to witnesses in any matter under the investigation or consideration of the state board of equalization may be administered by the secretary of the board or by any member thereof. In case any witness shall fail to obey any summons to appear before said board or shall refuse to testify or answer any material questions or to produce records, books, papers, or documents, when required to do so, such failure or refusal shall be reported to the attorney general, who shall thereupon institute proceedings in the proper district court to compel obedience to any summons or order of the board or to punish witnesses for any such neglect or refusal. Any person who shall testify falsely in any material manner under the consideration of the said board shall be guilty of and punished for perjury. In the discretion of the said board, officers who serve summons or subpoenas, and witnesses attending, shall receive like compensation as officers and witnesses in the district court.

History: En. Sec. 25, Ch. 65, L. 1923.

48 C.J. Perjury § 54 et seq.; 61 C.J. Taxation § 2609 et seq.; 70 C.J. Witnesses § 44.

Perjury⌚7; Taxation⌚893; Witnesses ⌚21.

91-4456. (10400.47) Repealing clause—effect of repeal. Sections 10377 to 10400, both inclusive, of the Revised Codes of Montana, 1921, and all other acts and parts of acts in conflict herewith are hereby repealed, provided, however, that such repeal shall not in any wise affect any suit, prosecution or proceeding pending at the time this act shall take effect, or any right which the state of Montana may have at the time of the taking effect of this act to claim a tax upon any property, or from any person, under the provisions of any of the sections or acts hereby repealed or under any prior laws repealed by such acts and which rights were reserved therein, for which no proceeding has been commenced to collect any tax arising thereunder, and where no proceeding has been commenced to collect any such tax the procedure to collect the same shall conform to the provisions hereof, and such repeal shall not affect any appeal or right of appeal in any suit now pending, or any order or orders fixing or determining the amount of any tax or taxes existing in this state at the time of the taking effect of this act.

History: En. Sec. 26, Ch. 65, L. 1923.

Taxation⌚862.

References

61 C.J. Taxation § 2404.

In re Clark's Estate, 105 M 401, 408, 74 P 2d 401.

91-4457. (10400.48) To what estates act applicable. The provisions of this act shall apply to all estates of all decedents dying after the date when this act takes effect, and shall also apply to the estate of any decedent on which the inheritance tax has not been determined by the court and paid prior to the date when this act takes effect to the same extent, and in the same manner, as though this act had been in full force and effect at the date of death of such decedent.

History: En. Sec. 3, Ch. 48, Ex. L. 1933.

Taxation⌚861.

61 C.J. Taxation §§ 2352, 2390.

91-4458. (10400.50) List of deaths to be made by registrar of vital statistics—county clerks to receive. The state registrar of vital statistics shall prepare on or before the fifth of January, April, July and October of each year a list of all deaths, together with the date of such death, reported to him during such period and shall send a copy of such list of deaths to the county clerk of each county in the state.

History: En. Sec. 2, Ch. 186, L. 1935.

Health⊕34.

39 C.J.S. Health §§ 19, 26.

91-4459. (10400.51) Checking by county clerk of records and transfers—report to board of equalization. The county clerk, upon the receipt of the list of deaths provided for in section 91-4458, shall immediately check the records of his county to determine whether any of the deceased persons whose names appear upon such list may have made any transfer of property or of property rights within such county during the three years preceding the death of such person or whether such deceased person may have been possessed of any property in such county at the time of his death.

If he shall find that any such deceased person may have made any such transfers of property or of property rights, or have died possessed of such, he shall immediately transmit such information to the state board of equalization.

History: En. Sec. 3, Ch. 186, L. 1935.

Taxation⊕893.

61 C.J. Taxation § 2609 et seq.

CHAPTER 45

GUARDIAN AND WARD

- Section 91-4501. Guardian defined.
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 91-4523. Guardian appointed by parent—how superseded.
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91-4501. (5868) Guardian defined. A guardian is a person appointed to take care of the person or property of another.

History: En. Sec. 409, p. 345, L. 1877; 1879; re-en. Sec. 409, Second Div. Comp. re-en. Sec. 409, Second Div. Rev. Stat. Stat. 1887; re-en. Sec. 330, Civ. C. 1895;

re-en. Sec. 3773, Rev. C. 1907; re-en. Sec. 5868, R. C. M. 1921.

Cross-Reference

Married woman may act without husband's consent, sec. 36-127.

References

Davis v. Industrial Accident Board, 92 M 503, 510, 15 P 2d 919.

Guardian and Ward ~~1~~.
39 C.J.S. Guardian and Ward § 1.

91-4502. (5869) Ward—to whom designation applied. The person over whom or over whose property a guardian is appointed is called a ward.

History: En. Sec. 410, p. 345, L. 1877; re-en. Sec. 410, Second Div. Rev. Stat. 1879; re-en. Sec. 410, Second Div. Comp. Stat. 1887; re-en. Sec. 331, Civ. C. 1895;
re-en. Sec. 3774, Rev. C. 1907; re-en. Sec. 5869, R. C. M. 1921. Cal. Civ. C. Sec. 237. Field Civ. C. Sec. 118.

91-4503. (5870) Kinds of guardians. Guardians are either:

1. General; or,
2. Special.

History: En. Sec. 411, p. 345, L. 1877; re-en. Sec. 411, Second Div. Rev. Stat. 1879; re-en. Sec. 411, Second Div. Comp. Stat. 1887; re-en. Sec. 332, Civ. C. 1895;
re-en. Sec. 3775, Rev. C. 1907; re-en. Sec. 5870, R. C. M. 1921. Cal. Civ. C. Sec. 238. Field Civ. C. Sec. 119.

91-4504. (5871) General guardian defined. A general guardian is a guardian of the person, or of all the property of the ward within this state, or of both.

History: En. Sec. 412, p. 345, L. 1877; re-en. Sec. 412, Second Div. Rev. Stat. 1879; re-en. Sec. 412, Second Div. Comp. Stat. 1887; re-en. Sec. 333, Civ. C. 1895;
re-en. Sec. 3776, Rev. C. 1907; re-en. Sec. 5871, R. C. M. 1921. Cal. Civ. C. Sec. 239. Field Civ. C. Sec. 120.

91-4505. (5872) Special guardian defined. Every other is a special guardian.

History: En. Sec. 413, p. 345, L. 1877; re-en. Sec. 413, Second Div. Rev. Stat. 1879; re-en. Sec. 413, Second Div. Comp. Stat. 1887; re-en. Sec. 334, Civ. C. 1895;
re-en. Sec. 3777, Rev. C. 1907; re-en. Sec. 5872, R. C. M. 1921. Cal. Civ. C. Sec. 240. Field Civ. C. Sec. 121.

91-4506. (5873) Nomination by parent. A guardian of the person or property, or of both, of a child born, or likely to be born, may be nominated by will or deed, to take effect upon the death of the parent nominating:

1. If the child be legitimate, by the father, with the written consent of the mother; or by either parent if the other be dead or incapable of consent.
2. If the child be illegitimate, by the mother.

History: En. Sec. 414, p. 346, L. 1877; re-en. Sec. 414, Second Div. Rev. Stat. 1879; re-en. Sec. 414, Second Div. Comp. Stat. 1887; re-en. Sec. 335, Civ. C. 1895; re-en. Sec. 3778, Rev. C. 1907; re-en. Sec. 5873, R. C. M. 1921. Cal. Civ. C. Sec. 241. Field Civ. C. Sec. 122.
Guardian and Ward ~~1~~.
39 C.J.S. Guardian and Ward § 13.
25 Am. Jur. 15, 16, Guardian and Ward, §§ 12-15.
Power of parent to appoint testamentary guardian for adult imbecile child. 24 ALR 1458.

References

Haynes v. Fillner, 106 M 59, 77, 75 P 2d 802.

Renunciation of will by spouse and election to take under statute as affecting provisions imposing upon spouse personal duty as trustee, executor, guardian or the like. 71 ALR 665.

91-4507. (5874) No person guardian of estate without appointment. No person, whether a parent or otherwise, has any power as guardian of property, except by appointment as hereinafter provided.

History: En. Sec. 415, p. 346, L. 1877; re-en. Sec. 415, Second Div. Rev. Stat. 1879; re-en. Sec. 415, Second Div. Comp. Stat. 1887; re-en. Sec. 336, Civ. C. 1895; re-en. Sec. 3779, Rev. C. 1907; re-en. Sec. 5874, R. C. M. 1921. Cal. Civ. C. Sec. 242. Field Civ. C. Sec. 123.

91-4508. (5875) Appointment by court. A guardian of the person or property, or both, of a person residing in this state, who is a minor, or of unsound mind, may be appointed in all cases, other than those named in section 91-4506, by the district court, as provided in this Title.

History: En. Sec. 416, p. 346, L. 1877; re-en. Sec. 416, Second Div. Rev. Stat. 1879; re-en. Sec. 416, Second Div. Comp. Stat. 1887; re-en. Sec. 337, Civ. C. 1895; re-en. Sec. 3780, Rev. C. 1907; re-en. Sec. 5875, R. C. M. 1921. Cal. Civ. C. Sec. 243. Field Civ. C. Sec. 124.

Appointment of guardian for infant as affecting rights and duties of parents. 63 ALR 1147.

Right of guardian to allowance for expenditures prior to appointment. 67 ALR 1405.

Right of parent to notice and hearing before being deprived of custody of child. 76 ALR 242.

Waiver by alleged incompetent of notice of proceeding for appointment of guardian. 152 ALR 1247.

25 Am. Jur., Guardian and Ward, p. 17, § 16; p. 21, §§ 23 et seq.

Validity of appointment of guardian or curator for infant without service of process upon, or notice to, latter. 1 ALR 919.

91-4509. (5876) Guardian of property of nonresident person—appointment by court. A guardian of the property within this state of a person not residing therein, who is a minor, or of unsound mind, may be appointed by the district court.

History: En. Sec. 417, p. 346, L. 1877; re-en. Sec. 417, Second Div. Rev. Stat. 1879; re-en. Sec. 417, Second Div. Comp. Stat. 1887; re-en. Sec. 338, Civ. C. 1895; re-en. Sec. 3781, Rev. C. 1907; re-en. Sec. 5876, R. C. M. 1921. Field Civ. C. Sec. 125.

Guardian and Ward—13 et seq.; Insane Persons—30-39.

39 C.J.S. Guardian and Ward § 20 et seq.; 44 C.J.S. Insane Persons § 35 et seq.

25 Am. Jur., Guardian and Ward, p. 22, § 25; p. 31, §§ 40, 41.

91-4510. (5877) Jurisdiction. In all cases the court making the appointment of a guardian has exclusive jurisdiction to control him.

History: En. Sec. 418, p. 346, L. 1877; re-en. Sec. 418, Second Div. Rev. Stat. 1879; re-en. Sec. 418, Second Div. Comp. Stat. 1887; re-en. Sec. 339, Civ. C. 1895; re-en. Sec. 3782, Rev. C. 1907; re-en. Sec.

5877, R. C. M. 1921. Cal. Civ. C. Sec. 245. Based on Field Civ. C. Sec. 126.

Guardian and Ward—8, 13(1), 123, 144. 39 C.J.S. Guardian and Ward §§ 6, 7, 9-11, 21, 153, 173.

91-4511. (5877.1) Transfer of guardianship matter to other county. The district court in and for any county having jurisdiction of any guardianship matter shall have power, whenever the interest of the ward and convenience of the guardian shall require, to transfer the same to the district court in and for any other county.

History: En. Sec. 1, Ch. 21, L. 1933.

39 C.J.S. Guardian and Ward §§ 21, 153, 154, 157, 173.

Guardian and Ward—13 (1), 124, 145.

91-4512. (5877.2) Petition for transfer—contents. To obtain an order for such transfer, the guardian shall file in the district court in and for the county where such proceeding is pending, a verified petition setting forth the following matters:

1. The name of the county to which it is sought to remove such proceeding;

2. The name of the county or counties in which the ward resides and that in which the guardian resides;
3. The name of the county or counties in which the property of such ward is situated, and a designation of the character and condition thereof;
4. The reasons for such removal;
5. The names and residences, so far as the same are known to said guardian, of the relatives within the third degree of such ward, residing in said county in which said proceeding is pending.

History: En. Sec. 2, Ch. 21, L. 1933.

91-4513. (5877.3) Hearing on petition. Upon filing such petition, an order shall be made by the court or judge fixing a time for hearing said petition, which shall be not less than ten days thereafter, and directing that a copy of such order be sent through the United States mail to each of the said relatives of such ward, named in said petition as resident in the county in which said proceeding is pending. The court may require such other or further notice of said hearing as it may deem proper.

History: En. Sec. 3, Ch. 21, L. 1933.

91-4514. (5877.4) Proceedings on hearing—order of transfer. At the time fixed for the hearing of said petition any relatives of such ward or any person interested in the estate of such ward, may appear and file written grounds of opposition to said petition. If, after hearing the evidence of the petitioner, and contestant, if any, it shall appear to the court that it is for the best interest and advantage of said ward, or of the estate of said ward, that the transfer of said proceeding be had to the district court in and for the county designated in said petition, or to the district court in and for any other county, it shall enter an order directing the transfer thereof to said court and directing the clerk to forward all papers on file therein to the clerk of the court to which said proceeding has been ordered transferred, and thereafter, the court to which said proceeding has been transferred shall have jurisdiction of the cause, the guardian, his wards, their estate, and all proceedings therein, as fully as though said proceeding originally began in that court.

History: En. Sec. 4, Ch. 21, L. 1933.

91-4515. (5878) Rules of awarding custody of minors. In awarding the custody of a minor, or in appointing a general guardian, the court or officer is to be guided by the following considerations:

1. By what appears to be for the best interests of the child in respect to its temporal and its mental and moral welfare, and if the child be of sufficient age to form an intelligent preference, the court may consider that preference in determining the question.

2. As between parents adversely claiming the custody or guardianship, neither parent is entitled to it as of right; but other things being equal, if the child be of tender years, it should be given to the mother; if it be of an age to require education and preparation for labor or business, then to the father.

3. Of two persons equally entitled to the custody in other respects, preference is to be given as follows:

First—To a parent.

Second—To one who was indicated by the wishes of a deceased parent.

Third—To one who already stands in the position of a trustee of a fund to be applied to the child's support.

Fourth—To a relative.

History: En. Sec. 419, p. 347, L. 1877; re-en. Sec. 419, Second Div. Rev. Stat. 1879; re-en. Sec. 419, Second Div. Comp. Stat. 1887; re-en. Sec. 340, Civ. C. 1895; re-en. Sec. 3783, Rev. C. 1907; re-en. Sec. 5878, R. C. M. 1921. Cal. Civ. C. Sec. 246. Based on Field Civ. C. Sec. 127.

Jurisdiction in Equity

Courts of equity have inherent jurisdiction, invoked by petition, to award the custody of minor children, and such jurisdiction is not taken away by a statute conferring like power upon another court. *Haynes v. Fillner*, 106 M 59, 71, 75 P 2d 802.

Operation and Effect

When the district court found that defendant was a man much attached to his minor children, had at all times provided for them in a suitable manner and taken much interest in their education and general welfare, was a fit and proper person to have their care and custody, that the children had expressed a desire to live with him, and that it was for their best interest that they should be kept and raised together, and therefore awarded their custody to him, subject to the right of the mother to visit them at reasonable times, the presumption obtains, nothing appearing in the record on appeal to the contrary, that the court exercised the discretion lodged in it, and its action will be affirmed. *Boles v. Boles*, 60 M 411, 199 P 912.

Oral Agreement Enforced

In action to enforce the specific performance of an oral agreement under which the father of an infant girl, upon the death of his wife, voluntarily surrendered custody to plaintiff to care and educate it without expense to the father, holding of trial court upheld, that the best interests of the child required that it remain in the custody of plaintiff. *Haynes v. Fillner*, 106 M 59, 66, 75 P 2d 802.

Order of Preference

As between the parent and grandparent, the law prefers the former as the custodian of an infant child, unless the parent is incompetent or unfit because of poverty or depravity to provide the physical comforts and moral training essential to the life and well-being of the child. *Ex parte Bourquin*, 88 M 118, 122, 290 P 250.

Parent's Right to Custody Not Absolute

The parent's right to the custody of his minor child is not an absolute one, even though it be conceded that he is a fit and proper person, as where by circumstances beyond his control he relinquished custody to one who for six years bestowed upon it excellent care and attention, demanded its return under an arrangement highly problematical by reason of his occupation requiring his absence from the city much of the time, while its welfare was reasonably assured by the affections between it and the foster parent. *Haynes v. Fillner*, 106 M 59, 76, 75 P 2d 802.

Presumption for Parent Rebuttable

Where custody is in dispute, the presumption that the best interests of child require that it be awarded to the parent, is a rebuttable one; each case must be decided upon its own peculiar facts and circumstances. *Haynes v. Fillner*, 106 M 59, 71, 75 P 2d 802.

Welfare of Child Paramount

In awarding the custody of a minor, the welfare of the child is to be regarded more than the technical rights of the parents, and the decision of the district judge ought not to be disturbed except upon a clear showing of abuse of discretion lodged in him. *In re Thompson*, 77 M 466, 476, 251 P 163.

In awarding the custody of a child, the court must be guided by the rule that the paramount consideration is the best interests of the child in respect to its temporal, mental and moral welfare. *Haynes v. Fillner*, 106 M 59, 66, 75 P 2d 802.

References

Cited or applied as sec. 3783, Revised Codes, in *State ex rel. Nipp v. District Court*, 46 M 425, 434, 128 P 590.

Guardian and Ward—10; Infants—19.
39 C.J.S. Guardian and Ward §§ 17-19;
43 C.J.S. Infants § 24.

Minority of parent as affecting right to guardianship or custody of person or estate of child. 19 ALR 1043.

Right of parent to notice and hearing before being deprived of custody of child. 76 ALR 242.

91-4516. (5879) Powers of guardian appointed by court. A guardian appointed by a court has power over the person and property of the ward, unless otherwise ordered.

History: En. Sec. 420, p. 347, L. 1877; re-en. Sec. 420, Second Div. Rev. Stat. 1879; re-en. Sec. 420, Second Div. Comp. Stat. 1887; re-en. Sec. 341, Civ. C. 1895; re-en. Sec. 3784, Rev. C. 1907; re-en. Sec. 5879, R. C. M. 1921. Cal. Civ. C. Sec. 247. Field Civ. C. Sec. 128.

Guardian and Ward 28-74.

39 C.J.S. Guardian and Ward § 56 et seq.

25 Am. Jur. 40, Guardian and Ward, §§ 60 et seq.

91-4517. (5880) Duties of guardian of the person. A guardian of the person is charged with the custody of the ward, and must look to his support, health, and education. He may fix the residence of the ward at any place within the state, but not elsewhere, without the permission of the court.

History: En. Sec. 421, p. 347, L. 1877; re-en. Sec. 421, Second Div. Rev. Stat. 1879; re-en. Sec. 421, Second Div. Comp. Stat. 1887; re-en. Sec. 342, Civ. C. 1895; re-en. Sec. 3785, Rev. C. 1907; re-en. Sec. 5880, R. C. M. 1921. Cal. Civ. C. Sec. 248. Field Civ. C. Sec. 129.

Operation and Effect

Held, that the provision of this section that a guardian may not fix the residence of his ward outside the state without permission of the court, does not prevent allowance of credit to the guardian for keeping his ward in private sanatoriums for the insane in another state, where the court at the time of his appointment knew the ward was in such state and had al-

lowed claims for her maintenance there with such knowledge. *Kelly v. Kelly et al.*, 89 M 229, 297 P 470.

Guardian and Ward 29, 30.

39 C.J.S. Guardian and Ward §§ 57-60.

25 Am. Jur. 41, Guardian and Ward, §§ 62-71.

Right of guardian to expend principal of ward's estate for maintenance and support. 5 ALR 632.

Right and obligation of guardian other than parents in respect of services rendered by, or board or services furnished to, ward. 64 ALR 692.

Right of guardian to allowance for expenditures prior to appointment. 67 ALR 1405.

91-4518. (5881) Duties of guardian of estate. A guardian of the property must keep safely the property of his ward. He must not permit any unnecessary waste or destruction of the real property, nor make any sale of such property without the order of the district court, but must, so far as it is in his power, maintain the same with its buildings and appurtenances, out of the income or other property of the ward, and deliver it to the ward at the close of his guardianship, in as good condition as he received it.

History: En. Sec. 422, p. 347, L. 1877; re-en. Sec. 422, Second Div. Rev. Stat. 1879; re-en. Sec. 422, Second Div. Comp. Stat. 1887; re-en. Sec. 343, Civ. C. 1895; re-en. Sec. 3786, Rev. C. 1907; re-en. Sec. 5881, R. C. M. 1921. Cal. Civ. C. Sec. 249. Based on Field Civ. C. Sec. 130.

Deposit of Trust Fund by Guardian

The position of guardian is one of trust and not of agency; the funds coming into his hands as such are trust funds which he must keep safely, and such of them as are necessary to be kept on hand for the care and maintenance of the ward he may, though not required to do so by the statute, deposit in a reliable bank, exercising due care in its selection, without being open to the charge of having violated the

law of his trust, or rendering himself personally liable for the deposit in case of failure of the bank. *Pethybridge v. First State Bk. of Livingston*, 75 M 173, 179, 243 P 569.

Id. In order to escape personal liability for funds of his ward deposited in a bank by a guardian, he must make the deposit in the former's name, or see to it that they appear on the books of the bank under a designation indicating that they belong to the ward and not to the guardian.

Investment of Ward's Funds

While a guardian is not an insurer of the safety of the investments of the ward's money, and a mere error of judgment will not subject him to personal liability for its loss, if he invests or loans it without

an order of court, he assumes the entire risk, and will be held to strict accountability, irrespective of the degree of care exercised in the premises. *Kelly v. Kelly et al.*, 89 M 229, 239, 297 P 470.

Id. Held, under the last above rule, that where a guardian de facto, occupying, as he did, a position of trust and not of agency, deposited funds of his ward in a bank taking a certificate of deposit therefor without first obtaining an order of court to that effect and the bank thereafter failed, he in effect made a loan of the ward's funds without security and was not entitled to credit for the amount thus loaned, other than the dividends paid or payable by the receiver of the insolvent bank.

References

Cited or applied as sec. 3786, Revised Codes, in *In re Allard Guardianship*, 49 M 219, 223, 141 P 661; *In re Welch's Estate*, 100 M 47, 52, 45 P 2d 681.

Guardian and Ward \Rightarrow 22-74.

39 C.J.S. Guardian and Ward § 77 et seq.
25 Am. Jur. 48, Guardian and Ward, §§ 72-80.

Constitutionality of statute authorizing guardian to sell or lease land of ward. 4 ALR 1552.

Power of court to authorize guardian to borrow ward's money. 30 ALR 461.

Lapse of time after guardian's settlement as affecting liability of guardian or his sureties. 50 ALR 61.

Duty of one purchasing ward's property applied. 56 ALR 195.

Right of court or guardian to use funds of incompetent for benefit of other than incompetent. 59 ALR 653.

Power of sale as including power to exchange. 63 ALR 1003.

Right of guardian or other fiduciary to purchase property of estate or trust at sale brought about by third person. 77 ALR 1513.

Liability of guardian or other fiduciary for loss of funds invested, as affected by order of court authorizing the investment. 88 ALR 325.

Proceeds of sale or condemnation of real property of infant or incompetent as real or personal property. 90 ALR 897.

Conclusiveness and effect of settlement of annual or intermediate accounts of guardian of infant or incompetent. 99 ALR 996.

Power of guardian to sell ward's property without order of court. 108 ALR 936.

Right of guardian or committee of incompetent to incur obligations so as to bind incompetent or his estate, or to make expenditures, without prior approval by court. 130 ALR 113.

Power of guardian or committee to compromise liquidated contract claim or money judgment, and of courts to authorize or approve such a compromise. 155 ALR 196.

Power of guardian to agree to, or of court to approve, voluntary partition between infant or incompetent and cotenant. 157 ALR 755.

Improper purpose as invalidating guardian's sale where sale is also for proper purpose. 158 ALR 1438.

91-4519. (5882) **Relation confidential.** The relation of a guardian and ward is confidential, and is subject to the provisions of this code relative to trusts.

History: En. Sec. 423, p. 347, L. 1877; re-en. Sec. 423, Second Div. Rev. Stat. 1879; re-en. Sec. 423, Second Div. Comp. Stat. 1887; re-en. Sec. 344, Civ. C. 1895; re-en. Sec. 3787, Rev. C. 1907; re-en. Sec. 5882, R. C. M. 1921. Cal. Civ. C. Sec. 250. Field Civ. C. Sec. 131.

Operation and Effect

The position of guardian is one of trust and not of agency; the funds coming into his hands as such are trust funds which he must keep safely, and such of them as are necessary to be kept on hand for the care and maintenance of the ward he may, though not required to do so by the statute, deposit in a reliable bank, exercising due care in its selection, without being open to the charge of having violated the law of his trust, or rendering himself personally liable for the deposit in case of

failure of the bank. *Pethybridge v. State Bk. of Livingston*, 75 M 173, 179, 243 P 569.

While a guardian is not an insurer of the safety of the investments of the ward's money, and a mere error of judgment will not subject him to personal liability for its loss, if he invests or loans it without an order of court he assumes the entire risk, and will be held to strict accountability, irrespective of the degree of care exercised in the premises. *Kelly v. Kelly et al.*, 89 M 229, 239, 297 P 470.

References

Cited or applied as sec. 3787, Revised Codes, in *In re Allard Guardianship*, 49 M 219, 223, 141 P 661.

Guardian and Ward \Rightarrow 28.

39 C.J.S. Guardian and Ward § 68.

91-4520. (5883) **Guardian under direction of court.** In the management and disposition of the person or property committed to him, a guardian may be regulated and controlled by the court.

History: En. Sec. 424, p. 348, L. 1877; re-en. Sec. 424, Second Div. Rev. Stat. 1879; re-en. Sec. 424, Second Div. Comp. Stat. 1887; re-en. Sec. 345, Civ. C. 1895; re-en. Sec. 3788, Rev. C. 1907; re-en. Sec. 5883, R. C. M. 1921. Cal. Civ. C. Sec. 251. Field Civ. C. Sec. 132.

Operation and Effect

The guardian of minors is an officer of the court, subject to its directions. In re Allard Guardianship, 49 M 219, 222, 141 P 661.

Guardian and Ward 75, 144.
39 C.J.S. Guardian and Ward §§ 105, 153.

91-4521. (5884) **Death of a joint guardian.** On the death of one of two or more joint guardians, the power continues to the survivor until a further appointment is made by the court.

History: En. Sec. 425, p. 348, L. 1877; re-en. Sec. 425, Second Div. Rev. Stat. 1879; re-en. Sec. 425, Second Div. Comp. Stat. 1887; re-en. Sec. 346, Civ. C. 1895; re-en. Sec. 3789, Rev. C. 1907; re-en. Sec.

5884, R. C. M. 1921. Cal. Civ. C. Sec. 252. Field Civ. C. Sec. 133.

Guardian and Ward 26.
39 C.J.S. Guardian and Ward § 40.

91-4522. (5885) **Removal of guardian.** A guardian may be removed by the district court for any of the following causes:

1. For abuse of his trust.
2. For continued failure to perform his duties.
3. For incapacity to perform his duties.
4. For gross immorality.
5. For having an interest adverse to the faithful performance of his duties.
6. For removal from the state.
7. In the case of the guardian of the property, for insolvency.
8. When it is no longer proper that the ward should be under guardianship.

History: En. Sec. 426, p. 348, L. 1877; re-en. Sec. 426, Second Div. Rev. Stat. 1879; re-en. Sec. 426, Second Div. Comp. Stat. 1887; re-en. Sec. 347, Civ. C. 1895; re-en. Sec. 3790, Rev. C. 1907; re-en. Sec. 5885, R. C. M. 1921. Cal. Civ. C. Sec. 253. Field Civ. C. Sec. 134.

falcation or deficit occurring before bond was given. 82 ALR 585.

Resignation or removal of executor, administrator, guardian, or trustee, before final administration or termination of trust, as affecting his compensation. 94 ALR 1101.

Right of surety on bond of trustee, executor, administrator, or guardian to terminate liability as regards future defaults of principal. 118 ALR 1261.

Improper handling of funds, investments, or assets as ground for removal of guardian of infant or incompetent. 128 ALR 535.

Guardian and Ward 25.
39 C.J.S. Guardian and Ward §§ 45, 46, 49-51.
25 Am. Jur. 37, Guardian and Ward, §§ 53 et seq.
Liability of sureties on bond of guardian, executor, administrator or trustee for de-

91-4523. (5886) **Guardian appointed by parent—how superseded.** The power of a guardian appointed by a parent is superseded:

1. By his removal, as provided in section 91-4522;
2. By the solemnized marriage of the ward; or,
3. By the ward's attaining majority.

History: En. Sec. 427, p. 348, L. 1877; re-en. Sec. 427, Second Div. Rev. Stat. 1879; re-en. Sec. 427, Second Div. Comp. Stat. 1887; re-en. Sec. 348, Civ. C. 1895;

re-en. Sec. 3791, Rev. C. 1907; re-en. Sec. 5886, R. C. M. 1921. Cal. Civ. C. Sec. 254. Based on Field Civ. C. Sec. 135.

Guardian and Ward—20, 21, 25.
39 C.J.S. Guardian and Ward §§ 42, 43, 45, 46, 49-51.

91-4524. (5887) Guardian appointed by court—how superseded. The power of a guardian appointed by a court is superseded only:

1. By order of the court; or,
2. If the appointment was made solely because of the ward's minority, by his attaining majority; or,
3. The guardianship over the person of the ward, by the marriage of the ward.

History: En. Sec. 428, p. 348, L. 1877; re-en. Sec. 428, Second Div. Rev. Stat. 1879; re-en. Sec. 428, Second Div. Comp. Stat. 1887; re-en. Sec. 349, Civ. C. 1895;

re-en. Sec. 3792, Rev. C. 1907; re-en. Sec. 5887, R. C. M. 1921. Cal. Civ. C. Sec. 255. Based on Field Civ. C. Sec. 136.

91-4525. (5888) Released by ward. After the ward has come to his majority, he may settle accounts with his guardian, and give him a release, which is valid if obtained fairly and without undue influence.

History: En. Sec. 429, p. 348, L. 1887; re-en. Sec. 429, Second Div. Rev. Stat. 1879; re-en. Sec. 429, Second Div. Comp. Stat. 1887; re-en. Sec. 350, Civ. C. 1895; re-en. Sec. 3793, Rev. C. 1907; re-en. Sec. 5888, R. C. M. 1921. Cal. Civ. C. Sec. 256. Field Civ. C. Sec. 137.

and fraud attaching to a ratification by the ward of his acts soon after reaching his majority, i. e., he must show good faith on his part and that the ward had full knowledge of all the guardian's transactions, but upon such showing the ratification must be approved.

Operation and Effect

Courts look upon settlements made by guardians with wards recently coming of age, as well as transactions between them, with distrust, and from the confidential relation existing between them it will be presumed that the ward was acting under the influence of the guardian and such transactions held constructively fraudulent and set aside unless shown to have been the deliberate act of the ward with full knowledge. In *re Cuffe's Estate*, 63 M 399, 406, 207 P 640.

Id. A guardian has the burden of removing the presumption of undue influence

Id. Where a guardian permits his ward to manage his (the ward's) estate, any act of the ward while operating and managing it is in law the act of the guardian.

Id. Evidence is a proceeding on the final account of the guardian held to show a ratification by the ward of the acts of the guardian, that in ratifying he was in no manner acting under the influence of the guardian, and that the ratification was such a one as is allowed by this section.

Guardian and Ward—142.

39 C.J.S. Guardian and Ward § 144.

25 Am. Jur. 37, Guardian and Ward, § 53.

91-4526. (5889) Guardian's discharge. A guardian appointed by a court is not entitled to his discharge until one year after the ward's majority.

History: En. Sec. 430, p. 348, L. 1887; re-en. Sec. 430, Second Div. Rev. Stat. 1879; re-en. Sec. 430, Second Div. Comp. Stat. 1887; re-en. Sec. 351, Civ. C. 1895; re-en. Sec. 3794, Rev. C. 1907; re-en. Sec. 5889, R. C. M. 1921. Cal. Civ. C. Sec. 257. Field Civ. C. Sec. 138.

Refusal or failure of executor, administrator, guardian, conservator, trustee, receiver, or other fiduciary to pay over, or account for, funds, as contempt. 134 ALR 927, in part supplementing 60 ALR 322.

Accounting by guardian, executor, administrator, or trustee as a necessary condition of action on his bond. 119 ALR 83.

Failure of executor, administrator, trustee or guardian to disclose self-dealing, as ground for vacating order or decree settling account. 132 ALR 1522.

Settlement of account of executor, administrator, trustee or guardian as precluding attack upon transaction involving self-dealing. 137 ALR 558.

Guardian and Ward—159.

39 C.J.S. Guardian and Ward § 157.

Death of guardian as affecting right to compensation. 7 ALR 1595.

Lapse of time after guardian's settlement as affecting liability of guardian or his sureties. 50 ALR 61.

CHAPTER 46

GUARDIANS OF MINORS

- Section 91-4601. Judge to appoint guardian, when and on what petition.
 91-4602. When minor may nominate guardian—when not.
 91-4603. When appointment may be by judge, when minor is over fourteen.
 91-4604. Nomination by minors after arriving at fourteen.
 91-4605. Father or mother entitled to guardianship.
 91-4606. Minor having no father or mother.
 91-4607. Powers and duties of guardians.
 91-4608. Bond of guardians, conditions of.
 91-4609. Maintenance of minor out of income of his own property.
 91-4610. Testamentary guardian to give bond—powers limited.
 91-4611. Power of courts to appoint guardian and next friend not impaired.

91-4601. (10401) Judge to appoint guardian, when and on what petition.

The district court of each county, when it appears necessary or convenient, may appoint guardians for the persons and estates, or either of them, of minors who have no guardian legally appointed by will or deed, and who are inhabitants or residents of the county, or who reside without the state and have estate within the county. Such appointment may be made on the petition of a relative or other person on behalf of the minor, or on the petition of the minor, if fourteen years of age. Before making such appointment, the court or judge must cause such notice as the court or judge deems reasonable to be given to any person having the care of such minor, and to such relatives of the minor in the county as the court or judge may deem proper.

History: En. Sec. 351, p. 331, L. 1877; re-en. Sec. 351, 2nd Div. Rev. Stat. 1879; re-en. Sec. 351, 2nd Div. Comp. Stat. 1887; amd. Sec. 2950, C. Civ. Proc. 1895; re-en. Sec. 7753, Rev. C. 1907; re-en. Sec. 10401, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1747.

References

Cited or applied as section 351, Second Division Compiled Statutes 1887, in *Hughes v. Goodale*, 26 M 93, 97, 66 P 702; as section 7753, Revised Codes, in *State ex rel. Carroll v. District Court*, 50 M 428, 432, 147 P 612; *August v. Burns*, 79 M 198, 214, 255 P 737; *State ex rel. Stimatz v. District Court*, 105 M 510, 515, 74 P 2d 8; *State ex rel. Haynes v. District Court*, 106 M 578, 584, 81 P 2d 422.

Guardian and Ward 8, 13 (1, 3).

39 C.J.S. *Guardian and Ward* §§ 6, 7, 9-11, 21-24, 29.

25 Am. Jur., *Guardian and Ward*, p. 17, § 16; p. 21, §§ 23 et seq.

Validity of appointment of guardian or curator for infant without service of process upon, or notice to, latter. 1 ALR 919.

Appointment of guardian for infant as affecting rights and duties of parents. 63 ALR 1147.

Right of guardian to allowance for expenditures prior to appointment. 67 ALR 1405.

Right of parent to notice and hearing before being deprived of custody of child. 76 ALR 242.

Waiver by alleged incompetent of notice of proceeding for appointment of guardian. 152 ALR 1247.

91-4602. (10402) When minor may nominate guardian—when not. If the minor is under the age of fourteen years, the court or judge may nominate and appoint his guardian. If he is fourteen years of age, he may nominate his own guardian, who, if approved by the court or judge, must be appointed accordingly.

History: En. Sec. 352, p. 331, L. 1877; re-en. Sec. 352, 2nd Div. Rev. Stat. 1879; re-en. Sec. 352, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2951, C. Civ. Proc. 1895; re-en. Sec. 7754, Rev. C. 1907; re-en. Sec. 10402, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1748.

Failure to Pass on Fitness of Father; Procedure

Where the father also had petitioned for preference appointment, but district court appointed the nominee of a minor nineteen years of age as his guardian without re-

gard to the fitness of the father, his qualifications were never passed upon, hence the order of appointment did not become *res judicata* on that issue, and the father has a plain, speedy and adequate remedy at law under sec. 91-1601 et seq., by petition for ousting the guardian ap-

pointed, and therefore was not entitled to a writ of supervisory control to annul the order. *State ex rel. Stimatz v. District Court*, 105 M 510, 515, 74 P 2d 8.

25 Am. Jur. 24, *Guardian and Ward*, § 280.

91-4603. (10403) When appointment may be made by judge, when minor is over fourteen. If the guardian nominated by the minor is not approved by the court or judge, or if the minor resides out of the state, or if, after being duly cited by the court or judge, he neglects for ten days to nominate a suitable person, the court or judge may nominate and appoint the guardian in the same manner as if the minor were under the age of fourteen years.

History: En. Sec. 353, p. 331, L. 1877; re-en. Sec. 353, 2nd Div. Rev. Stat. 1879; re-en. Sec. 353, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2952, C. Civ. Proc. 1895; re-en. Sec. 7755, Rev. C. 1907; re-en. Sec. 10403, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1749.

References

State ex rel. Stimatz v. District Court, 105 M 510, 514, 74 P 2d 8.

91-4604. (10404) Nomination by minors after arriving at fourteen. When a guardian has been appointed by the court or judge for a minor under the age of fourteen years, the minor, at any time after he attains that age, may appoint his own guardian, subject to the approval of the court or judge.

History: En. Sec. 354, p. 331, L. 1877; re-en. Sec. 354, 2nd Div. Rev. Stat. 1879; re-en. Sec. 354, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2953, C. Civ. Proc. 1895; re-en. Sec. 7756, Rev. C. 1907; re-en. Sec. 10404, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1750.

Guardian and Ward 19.

39 C.J.S. *Guardian and Ward* §§ 14, 49, 53.

91-4605. (10405) Father or mother entitled to guardianship. The father of the minor, if living, and in case of his decease, the mother, being themselves respectively competent to transact their own business, and not otherwise unsuitable, must be entitled to the guardianship of the minor. A married woman may be appointed guardian.

History: En. Sec. 355, p. 332, L. 1877; re-en. Sec. 355, 2nd Div. Rev. Stat. 1879; re-en. Sec. 355, 2nd Div. Comp. Stat. 1887; amd. Sec. 2954, C. Civ. Proc. 1895; re-en. Sec. 7757, Rev. C. 1907; re-en. Sec. 10405, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1751.

Cross-Reference

Married women may be guardians, sec. 36-127.

References

State ex rel. Stimatz v. District Court, 105 M 510, 515, 74 P 2d 8.

Guardian and Ward 10.

39 C.J.S. *Guardian and Ward* §§ 17-19.

25 Am. Jur. 10-15, *Guardian and Ward*, §§ 6-11.

Validity of appointment of guardian or curator for infant without service of process upon, or notice to, latter. 1 ALR 919.

Minority of parent as affecting right to guardianship or custody of person or estate of child. 19 ALR 1043.

Nonresidence as affecting one's right to award of custody of child. 20 ALR 838.

Right of guardian to allowance for expenditures prior to appointment. 67 ALR 1405.

Right of parent to notice and hearing before being deprived of custody of child. 76 ALR 242.

91-4606. (10406) Minor having no father or mother. If the minor has no father or mother living, competent to have the custody and care of his education, the guardian appointed shall have the same.

History: En. Sec. 356, p. 332, L. 1877; re-en. Sec. 356, 2nd Div. Rev. Stat. 1879; re-en. Sec. 356, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2955, C. Civ. Proc. 1895; re-en. Sec. 7758, Rev. C. 1907; re-en. Sec. 10406, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1752.

91-4607. (10407) Powers and duties of guardians. Every guardian appointed shall have the custody and care of the education of the minor, and the care and management of his estate, until such minor arrives at the age of majority or marries, or until the guardian is legally discharged.

History: En. Sec. 357, p. 332, L. 1877; re-en. Sec. 357, 2nd Div. Rev. Stat. 1879; re-en. Sec. 357, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2956, C. Civ. Proc. 1895; re-en. Sec. 7759, Rev. C. 1907; re-en. Sec. 10407, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1753.

Cross-References

Consent for marriage, sec. 48-118.

Disposing of ward for medicant purposes, penalty, sec. 94-305.

Ward's Powers in Law Suit upon Reaching Majority

Since a guardian bringing suit in behalf of his ward never was a party to it, no substitution is necessary when the ward becomes of age, the proper procedure merely being to eliminate the guardian from the case, both nominally and actually; the closing phrase of this section held not intended to mean that the guardian's authority continues in spite of the ward's majority, until his legal discharge. A ward becoming of age is no longer authoritatively represented either by his guardian or by the attorney employed by the guardian. *Mitchell v. McDonald*, 114 M 292, 299, 136 P 2d 536.

When Court Should Stay Proceedings for Proof of Re-employment of Counsel

Where a suit in behalf of a minor by his guardian had been properly instituted but the guardian's authority automatically terminated by the ward's attaining majority, the court, upon being advised, having inherent power to investigate an attorney's authority, should have stayed further proceedings until counsel for plaintiff was shown to have been re-employed by plaintiff, and committed error in proceeding to adjudicate his rights, being without jurisdiction of the cause. *Mitchell v. McDonald*, 114 M 292, 304, 136 P 2d 536.

References

Cited or applied as section 2956, Code of Civil Procedure, in *In re Scheuer's Estate*, 31 M 606, 613, 79 P 244; *State ex rel. Sheedey v. District Court*, 66 M 427, 434, 213 P 802; *August v. Burns*, 79 M 198, 214, 255 P 737.

Guardian and Ward § 30 (1), 37.

39 C.J.S. Guardian and Ward §§ 60, 62, 63, 69, 70, 76.

25 Am. Jur. 40, Guardian and Ward, §§ 60 et seq.

91-4608. (10408) Bond of guardians, conditions of. Before the order appointing any person guardian under this chapter takes effect, and before letters issue, the court or judge must require of such person a bond to the minor with sufficient sureties, to be approved by the judge, and in such sum as he shall order, conditioned that the guardian will faithfully execute the duties of his trust according to law, and the following conditions shall form a part of such bond without being expressed therein:

1. To make an inventory of all the estate, real and personal, of his ward, that comes to his possession or knowledge, and to return the same within such time as the court or judge may order.

2. To dispose of and manage the estate according to law and for the best interest of the ward, and faithfully to discharge his trust in relation thereto, and also in relation to the care, custody, and education of the ward.

3. To render an account on oath of the property, estate, and moneys of the ward in his hands, and all the proceeds or interests derived therefrom, and of the management and disposition of the same, within three months after his appointment, and at such other times as the court or judge directs, and at the expiration of his trust to settle his accounts with

the court or judge, or with the ward, if he be of full age, or his legal representatives, and to pay over and deliver all the estate, moneys, and effects remaining in his hands, or due from him on such settlement, to the person who is lawfully entitled thereto. Upon filing the bond, duly approved, letters of guardianship must issue to the person appointed. In form the letters of guardianship must be substantially the same as letters of administration, and the oath of the guardian must be indorsed thereon that he will perform the duties of his office as such guardian according to law.

History: En. Sec. 358, p. 332, L. 1877; re-en. Sec. 358, 2nd Div. Rev. Stat. 1879; re-en. Sec. 358, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2957, C. Civ. Proc. 1895; re-en. Sec. 7760, Rev. C. 1907; re-en. Sec. 10408, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1754.

Operation and Effect

If the order of restoration terminates the guardianship, then the expression "the expiration of his trust," as used in this section, and the order for the restoration of the ward to capacity, as provided for in section 91-4704, must of necessity refer to the same event in point of time, and it becomes the duty of the guardian to settle his accounts with the court or judge, or with the ward, and pay over and deliver all the estate, moneys, and effects remaining in his hands, or due from him on such settlement, to the person lawfully entitled thereto. In *re Scheuer's Estate*, 31 M 606, 612, 79 P 244.

Id. The powers, duties, and liabilities of a guardian of a person of unsound mind are the same, and subject to the same restrictions, as those of a guardian of a minor.

Surety Liable For Prior As Well As Prospective Defaults

Where a guardian had occupied residence property of which he and his ward were equal half owners, the substituted surety on his bond conditioned on his faithful discharge of his trust and on settlement of accounts he would pay over all moneys due from him to the trust under this section properly held liable not only

for rent of the portion of the property owned by his ward for the time after his appointment but also for the period of his occupancy prior thereto, as against the surety's contention that its responsibility was limited to prospective liability only. *Mitchell v. Columbia Casualty Co.*, 111 M 88, 90, 106 P 2d 344.

References

Cited or applied as section 358, Second Division Compiled Statutes 1887, in *Botkin v. Kleinschmidt*, 21 M 1, 52 P 563; as section 2957, Code of Civil Procedure, in *Power v. Lenoir*, 22 M 169, 178, 56 P 106; *Hughes v. Goodale*, 26 M 93, 97, 93 P 702.

Guardian and Ward—15.

39 C.J.S. Guardian and Ward §§ 32-36.

25 Am. Jur. 34, Guardian and Ward, § 47.

Leave of court as prerequisite to action on statutory bond. 2 ALR 563.

Invalidity of designation of officer, fiduciary or depository as affecting liability on bond. 18 ALR 274.

Right of sureties on bonds to take advantage of noncompliance with statutory requirement as to approval of bond. 77 ALR 1479.

Liability of sureties on bond of guardian, executor, administrator or trustee for defalcation or deficit occurring before bond was given. 82 ALR 585.

Right of surety on bond of trustee, executor, administrator or guardian to terminate liability as regards future defaults of principal. 150 ALR 485.

91-4609. (10409) Maintenance of minor out of income of his own property. If any minor having a father living has property, the income of which is sufficient for his maintenance and education in a manner more expensive than his father can reasonably afford, regard being had to the situation of the father's family and to all the circumstances of the case, the expenses of the education and maintenance of such minor may be defrayed out of the income of his own property, in whole or in part, as judged reasonable, and must be directed by the court or judge, and the charges therefor may be allowed accordingly in the settlement of the accounts of his guardian.

History: En. Sec. 361, p. 333, L. 1877; re-en. Sec. 361, 2nd Div. Rev. Stat. 1879; re-en. Sec. 361, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2958, C. Civ. Proc. 1895; re-en. Sec. 7761, Rev. C. 1907; re-en. Sec. 10409, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1757.

25 Am. Jur., Guardian and Ward, p. 43, §§ 66 et seq.; p. 110, §§ 179 et seq.

Right of guardian to expend principal of ward's estate for maintenance and support. 5 ALR 632.

Right and obligation of guardian other than parent in respect of services rendered by, or board of services furnished to, ward. 64 ALR 692.

Right of guardian to allowance for expenditures prior to appointment. 67 ALR 1405.

Care required of trustee or guardian with respect to retaining securities coming into his hands as assets of the estate. 77 ALR 505 and 112 ALR 355.

Right of court or guardian to use funds of incompetent for benefit of others than incompetent. 160 ALR 1435.

91-4610. (10410) Testamentary guardian to give bond—powers limited.

Every testamentary guardian must give bond and qualify, and has the same powers and must perform the same duties with regard to the person and estate of his ward as guardians appointed by the court or judge, except so far as his powers and duties are legally modified, enlarged, or changed by the will by which such guardian was appointed.

History: En. Sec. 362, p. 333, L. 1877; re-en. Sec. 362, 2nd Div. Rev. Stat. 1879; re-en. Sec. 362, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2959, C. Civ. Proc. 1895; re-en. Sec. 7762, Rev. C. 1907; re-en. Sec. 10410, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1758.

Operation and Effect

Where a father assumed to act as guardian for his minor children without having qualified, and appeared for them in an action concerning property devised to them by their mother, the minors, though legally served, were not bound by the proceedings. *Power v. Lenior*, 22 M 169, 178, 56 P 106.

Id. Where a father appeared as guardian for his minor children without having qualified as their guardian, and defended an action against them with reference to their separate property, a nunc pro tunc order appointing him their guardian ad

litem before judgment rendered against them was unauthorized, and they were not bound by the judgment so entered.

References

Cited or applied as section 362, Second Division, Compiled Statutes 1887, in *Hughes v. Goodale*, 26 M 93, 97, 66 P 702.

Guardian and Ward—15, 28.

39 C.J.S. Guardian and Ward §§ 32-36, 68.

25 Am. Jur. 15, 16, Guardian and Ward, §§ 12-15.

Power of parent to appoint testamentary guardian for adult imbecile child. 24 ALR 1458.

Renunciation of will by spouse and election to take under statute as affecting provisions imposing upon spouse personal duty as trustee, executor, guardian or the like. 71 ALR 665.

91-4611. (10411) Power of courts to appoint guardian and next friend not impaired. Nothing contained in this chapter affects or impairs the power of any court or judge to appoint a guardian to defend the interests of any minor interested in any suit or matter pending therein.

History: En. Sec. 363, p. 333, L. 1877; re-en. Sec. 363, 2nd Div. Rev. Stat. 1879; re-en. Sec. 363, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2960, C. Civ. Proc. 1895; re-en.

Sec. 7763, Rev. C. 1907; re-en. Sec. 10411, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1759.

Infants—77.

43 C.J.S. Infants § 109.

CHAPTER 47

GUARDIANS OF INSANE AND INCOMPETENT PERSONS

- Section 91-4701. Guardians of insane and other incompetent persons.
 91-4702. Appointment by judge after hearing.
 91-4703. Powers and duties of such guardians.
 91-4704. Petition for restoration to capacity.
 91-4705. Sale of right of dower of insane or incompetent married woman, or of dower of insane or incompetent widow.
 91-4706. Power to mortgage right of dower of insane or incompetent married woman, or of dower of insane or incompetent widow—guardian.

91-4701. (10412) Guardians of insane and other incompetent persons. When it is represented to the district court, or a judge thereof, upon verified petition of any relative or friend, that any person is insane, or from any cause mentally incompetent to manage his property, such court or judge must cause a notice to be given to the supposed insane or incompetent person of the time and place of hearing the case, not less than five days before the time so appointed; and such person, if able to attend, must be produced on the hearing.

History: En. Sec. 364, p. 334, L. 1877; re-en. Sec. 364, 2nd Div. Rev. Stat. 1879; re-en. Sec. 364, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2970, C. Civ. Proc. 1895; re-en. Sec. 7764, Rev. C. 1907; re-en. Sec. 10412, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1763.

Guardian Ad Litem for Purpose of Hearing

Where court had jurisdiction of proceeding to appoint guardian for incompetent, but in absence of such person failed to appoint a guardian ad litem, the error, if any, was error within jurisdiction, the court having the right to make a wrong or a right decision, and writ of certiorari does not lie to correct such an error; a judgment against an incompetent not represented by a guardian is not absolutely void, but merely voidable, and will be sustained when collaterally attacked. State ex rel. Haynes v. District Court, 106 M 578, 584, 81 P 2d 422.

Jurisdiction Other Than Incompetent's Residence

The contention that only the district court of the county in which an alleged incompetent resides shall have jurisdiction of a proceeding to have him declared incompetent and a guardian appointed for him, may not be sustained, secs. 91-4701 and 91-4702 not so declaring. State ex rel. Haynes v. District Court, 106 M 578, 584, 81 P 2d 422.

Notice

On petition for the appointment of a guardian for an insane person, service of notice of time and place of hearing as required by this section is essential to the validity of the order of appointment. State v. District Court et al., 73 M 84, 89 et seq., 235 P 751.

Id. The notice required by this section, to be served upon a person sought to be placed under guardianship as an incompetent must be served as a citation, which in turn must be served as a summons; therefore, since a summons cannot be served by a party to the proceeding, service made by petitioner for letters of guardianship was void.

Notice under this section must be given, and, if able to attend, such alleged in-

competent person must be produced at the hearing; and where the requirements as to notice are strictly met, the essential elements of the due process of law clause of the constitution are present and the trial court has jurisdiction to pass upon the matter, as against the contention that such notice as here provided for is insufficient in the absence of notice to others than the alleged incompetent. State ex rel. Haynes v. District Court, 106 M 578, 582, 584, 81 P 2d 422.

Operation and Effect

In a proceeding to appoint a guardian for an alleged incompetent, the adversary parties are the petitioner and the alleged incompetent. In re Murphy's Estate, 43 M 353, 375, 116 P 1004.

A person may be mentally incompetent, and yet not be a maniac, an idiot, nor an insane person. State ex rel. Carroll v. District Court, 50 M 428, 433, 147 P 612.

Id. The words "mentally incompetent," as used in this section, mean a person who, though not insane, is, by reason of old age, disease, weakness of mind, or from any other cause, unable, without assistance, to properly manage and take care of himself and his property.

Held, that an instruction to the effect that a person may be mentally incompetent to make a will and yet not be an insane person was proper, since the word "incompetent," when applied to an individual's capacity to make a will, means any person who, whether insane or not, is, by reason of immaturity, old age, disease, weakness of mind or from any other cause, unable to understand what property he has, the relationship he bears to those who would naturally be the objects of his bounty, and what disposition he may be making of his property at the time. In re Carroll's Estate, 59 M 403, 410, 196 P 996.

The statute (this section) requiring production in court of alleged incompetent, for whom appointment of guardian is sought, would seem to contemplate her examination. State ex rel. Thompson v. District Court, ___ M ___, 163 P 2d 640, 645.

25 Am. Jur. 17, Guardian and Ward, §§ 17-22.

91-4702. (10413) Appointment by judge after hearing. If, after a full hearing and examination upon such petition, it appear to the court or judge that the person in question is incapable of taking care of himself and managing his property, such court or judge must appoint a guardian of his person and estate, with the powers and duties in this chapter specified.

History: En. Sec. 365, p. 334, L. 1877; re-en. Sec. 365, 2nd Div. Rev. Stat. 1879; re-en. Sec. 365, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2971, C. Civ. Proc. 1895; re-en. Sec. 7765, Rev. C. 1907; re-en. Sec. 10413, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1764.

Operation and Effect

While the person and estate of a minor are independent in guardianship matters, and the court may appoint a guardian for either the person or estate, or for both, as provided in section 91-4601, no such authority exists with respect to an incompetent person. In the latter case, the necessity for a guardian of the person is as great as the necessity for a guardian of the estate. State ex rel. Carroll v. District Court, 50 M 428, 432, 147 P 612.

To warrant appointment of guardian for

adult on ground of mental incompetency, adult need not be shown to be insane in technical sense, but test is whether there is such mental impairment as to render alleged incompetent incapable of understanding and acting in ordinary affairs of life. State ex rel. Thompson v. District Court, ___ M ___, 163 P 2d 640, 644.

Id. Unsoundness of mind, justifying appointment of guardian, must be more than mere debility, impairment of memory, or possibility of future insanity.

References

State ex rel. Haynes v. District Court, 106 M 578, 585, 81 P 2d 422.

Insane Persons \S 33 (1), 35.

44 C.J.S. Insane Persons \S 38, 39, 40, 44.

91-4703. (10414) Powers and duties of such guardians. Every guardian appointed, as provided in the preceding section, has the care and custody of the person of his ward, and the management of all his estate until such guardian is legally discharged; and he must give bond to such ward, in like manner and with like conditions as before prescribed with respect to the guardian of a minor.

History: En. Sec. 366, p. 334, L. 1877; re-en. Sec. 366, 2nd Div. Rev. Stat. 1879; re-en. Sec. 366, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2972, C. Civ. Proc. 1895; re-en. Sec. 7766, Rev. C. 1907; re-en. Sec. 10414, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1765.

Operation and Effect

The authority of a guardian of an incompetent over the person or estate of the ward is not extended by this section to the time when he is "legally discharged" by an order of court, but such guardianship is, under section 91-4704, terminated, ipso facto, by the judicial determination that the ward is of sound mind, and the adjudication of his restoration to capacity. In re Scheuer's Estate, 31 M 606, 611, 79 P 244.

Id. The language of this section cannot be construed to extend the guardian's authority over the person or estate of the ward beyond the time when he is "legally discharged" by an order of court. It would be an intolerable imposition upon a person sui juris to compel him to submit to the control of a guardian, either of his person or property, and such an imposition was not intended by the law-making authority in enacting this section.

Id. If the seeming conflict between the provisions of this section and the next succeeding section is not entirely reconcilable, the provisions of the latter must prevail.

The position of guardian is one of trust and not of agency; the funds coming into his hands as such are trust funds which he must keep safely, and such of them as are necessary to be kept on hand for the care and maintenance of the ward he may, though not required to do so by the statute, deposit in a reliable bank, exercising due care in its selection, without being open to the charge of having violated the law of his trust, or rendering himself personally liable for the deposit in case of failure of the bank. Pethybridge v. First State Bk. of Livingston, 75 M 173, 179, 243 P 569.

References

Cited or applied as section 7766, Revised Codes, in State ex rel. Carroll v. District Court, 50 M 428, 432, 147 P 612.

Insane Persons \S 35, 40.

44 C.J.S. Insane Persons \S 38, 39, 44, 49.

25 Am. Jur. 40, Guardian and Ward, \S 60 et seq.

Constitutionality of statute authorizing guardian to sell or lease land of ward. 4 ALR 1552.

Power of court to authorize guardian to borrow ward's money. 30 ALR 461.

Lapse of time after guardian's settlement as affecting liability of guardian or his sureties. 50 ALR 61.

Duty of one purchasing ward's property, or loaning money on security of such property, to see that proceeds are properly applied. 56 ALR 195.

Right of court or guardian to use funds of incompetent for benefit of other than incompetent. 59 ALR 653.

Power of sale as including power to exchange. 63 ALR 1003.

Right of guardian or other fiduciary to purchase property of estate or trust at sale brought about by third persons. 77 ALR 1513.

Liability of guardian or other fiduciary for loss of funds invested, as affected by order of court authorizing the investment. 83 ALR 325.

Proceeds of sale or condemnation of

real property of infant or incompetent as real or personal property. 90 ALR 897.

Conclusiveness and effect of settlement of annual or intermediate accounts of guardian of infant or incompetent. 99 ALR 996.

Power of guardian to sell ward's property without order of court. 108 ALR 936.

Right of guardian or committee of incompetent to incur obligations so as to bind incompetent or his estate, or to make expenditures, without prior approval by court. 130 ALR 113.

Power of guardian or committee to compromise liquidated contract claim or money judgment, and of courts to authorize or approve such a compromise. 155 ALR 196.

Power of guardian to agree to, or of court to approve, voluntary partition between infant or incompetent and cotenant. 157 ALR 755.

Improper purpose as invalidating guardian's sale where sale is also for proper purpose. 158 ALR 1438.

Right of court or guardian to use funds of incompetent for benefit of others than incompetent. 160 ALR 1435.

91-4704. (10415) Petition for restoration to capacity. A person who has been declared insane or incompetent, or the guardian, or any relative of such person within the third degree, or any friend, may apply, by petition, to the district court of the county in which he was declared insane, to have the fact of his restoration to capacity judicially determined. The petition shall be verified, and shall state that such person is then sane or competent. Upon receiving the petition, the court or judge must appoint a day for a hearing before the court, and, if the petitioner request it, shall order an investigation before a jury, which shall be summoned and impaneled in the same manner as juries are summoned and impaneled in civil actions. The court or judge shall cause notice of the trial to be given to the guardian of a person so declared insane or incompetent, if there be a guardian, and to his or her husband or wife, if there be one, and to his or her father or mother, if living in the county. On the trial, the guardian or relative of the person so declared insane or incompetent, and, in the discretion of the court or judge, any other person, may contest the right to the relief demanded. Witnesses may be required to appear and testify, as in civil cases, and may be called and examined by the court or judge on its own motion. If it be found that the person be of sound mind, and capable of taking care of himself and his property, his restoration to capacity shall be adjudged, and the guardianship of such person, if such person shall be not a minor, shall cease.

History: En. Sec. 2973, C. Civ. Proc. 1895; re-en. Sec. 7767, Rev. C. 1907; re-en. Sec. 10415, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1766.

Operation and Effect

The right of a person, mentally incompetent, to appeal from an order appointing a guardian of his person and estate is

not affected by the pendency of a proceeding to have the fact of his restoration to capacity judicially determined. In re Kane's Estate, 12 M 197, 202, 29 P 424.

The language of this section is susceptible of but one construction, namely, that the judicial determination that the ward is of sound mind, and capable of taking care of himself and his property, and the

adjudication of his restoration, ipso facto terminate the guardianship. *In re Scheuer's Estate*, 31 M 606, 611, 79 P 244.

Id. The term of the guardian's office is limited by this section, and immediately thereafter the guardian should make his final report and be discharged, and, after the termination of his office by the restoration of the ward, the only power or authority possessed by the guardian is to make such report, and turn over to the proper person all property with which he is chargeable on such report.

In a proceeding under this section either party may disqualify the judge for imputed bias. *State ex rel. Carroll v. District Court*, 50 M 506, 509, 148 P 312; *State ex rel. Brandegee v. Clements*, 52 M 57, 61, 155 P 271.

Upon the hearing of a petition for restoration to capacity the question whether the order declaring petitioner incompetent was correctly made is not a proper subject of inquiry; allegations as to its validity or invalidity are immaterial, and, therefore, since a pleader cannot be estopped by an immaterial averment, contention that by an allegation in the petition admitting the validity of the order and averring that it was in full force and effect petitioner was estopped on certiorari to attack the court's jurisdiction

in making it has no merit. *State v. District Court et al.*, 73 M 84, 92, 235 P 751.

Presumption of Insanity Rebuttable

The contention cannot be sustained that a juror adjudged insane under secs. 38-201 to 38-208 must be conclusively presumed to remain insane until restored to capacity under this section or until obtaining a certificate under sec. 64-112. By virtue of sec. 64-112 the adjudication establishes not a conclusive, but a rebuttable presumption of insanity. Sec. 64-112 substitutes for the presumption of sanity the presumption of insanity until the certificate provided for is obtained. *State v. Bucy*, 104 M 416, 419, 66 P 2d 1049.

References

Cited or applied as section 7767, Revised Codes, in *State ex rel. Carroll v. District Court*, 50 M 428, 433, 147 P 612; *State ex rel. Carroll v. District Court*, 50 M 506, 509, 148 P 312; *In re Carroll's Estate*, 59 M 403, 410, 196 P 996.

Insane Persons—29.

44 C.J.S. *Insane Persons* §§ 54-56, 72.

25 Am. Jur. 37, *Guardian and Ward*, § 53; 28 Am. Jur. 689, *Insane and Other Incompetent Persons*, §§ 51-54.

91-4705. (10416) Sale of right of dower of insane or incompetent married woman, or of dower of insane or incompetent widow. The right of dower of an insane married woman, or of an otherwise judicially declared mentally incompetent married woman, or dower of an insane widow or of an otherwise judicially declared mentally incompetent widow, may be sold by her guardian, and the title to the real estate transferred to the purchaser, under the direction of the court or judge, in the same manner and with like effect as the property of any insane person may be sold and transferred.

History: En. Sec. 2974, C. Civ. Proc. 1895; re-en. Sec. 7768, Rev. C. 1907; re-en. Sec. 10416, R. C. M. 1921; amd. Sec. 1, Ch. 19, L. 1937.

Insane Persons—71.

44 C.J.S. *Insane Persons* §§ 93-97, 100.

91-4706. (10416.1) Power to mortgage right of dower of insane or incompetent married woman, or of dower of insane or incompetent widow—guardian. The right of dower of an insane married woman, or of an otherwise judicially declared mentally incompetent married woman, or dower of an insane widow, or of an otherwise judicially declared mentally incompetent widow, may be mortgaged by her guardian for the purpose of paying either debts, costs and charges of maintenance, charges of administration or to pay, reduce, extend, or renew some lien or mortgage already subsisting on said right of dower or dower in real property or for the purpose of benefiting or improving the real estate in which said insane or incompetent married woman, or said insane or incompetent widow, has a right of dower or dower and to obtain an order of court to mortgage such right of dower or dower interest, the guardian shall take the same proceedings provided by

section 91-4911. The right of dower of an insane or incompetent married woman, or dower of an insane or incompetent widow, shall be deemed property for the purpose of authorizing the appointment of a guardian of her estate.

History: En. Sec. 1, Ch. 79, L. 1935;
amd. Sec. 2, Ch. 19, L. 1937.

CHAPTER 48

GUARDIANSHIP OF INCOMPETENT VETERANS, MINORS, AND OTHER BENEFICIARIES OF THE VETERANS ADMINISTRATION

Section	91-4801.	Definitions.
	91-4802.	Administrator as party in interest.
	91-4803.	Application.
	91-4804.	Limitation on number of wards.
	91-4805.	Appointment of guardians.
	91-4806.	Evidence of necessity for guardian of infant.
	91-4807.	Evidence of necessity for guardian for incompetent.
	91-4808.	Notice.
	91-4809.	Bond.
	91-4810.	Petitions and accounts, notices and hearings.
	91-4811.	Penalty for failure to account.
	91-4812.	Compensation of guardians.
	91-4813.	Investments.
	91-4814.	Maintenance and support.
	91-4815.	Purchase of home for ward.
	91-4816.	Copies of public records to be furnished.
	91-4817.	Discharge of guardian and release of sureties.
	91-4818.	Commitment to veterans' administration or other agency of United States government.
	91-4819.	Liberal construction.
	91-4820.	Short title.
	91-4821.	Modification of prior laws.
	91-4822.	Application of act.

91-4801. Definitions. As used in this act:

"Person" means an individual, a partnership, a corporation or an association.

"Veterans' Administration" means the veterans' administration, its predecessors or successors.

"Income" means moneys received from the veterans' administration and revenue or profit from any property wholly or partially acquired therewith.

"Estate" means income on hand and assets acquired partially or wholly with "income".

"Benefits" means all moneys paid or payable by the United States through the veterans' administration.

"Administrator" means the administrator of veterans' affairs of the United States or his successor.

"Ward" means a beneficiary of the veterans' administration.

"Guardian" means any fiduciary for the person or estate of a ward.

History: En. Sec. 1, Ch. 58, L. 1943. An earlier Veterans' Guardianship Act was Secs. 5654.1 to 5654.21, R. C. M. 1935.

NOTE.—Uniform State Law. Sections 91-4801 through 91-4822 constitute the Uniform Veterans' Guardianship Act approved, as revised, by the National Con-

ference of Commissioners on Uniform State Laws in 1942 and adopted in Arizona, Arkansas, California, Colorado, Idaho, Kentucky, Louisiana, Maryland, Nebraska, New Mexico, North Carolina, Oklahoma, South Dakota, Tennessee, Utah, Vermont and also in Hawaii.

Insane Persons—30.

44 C.J.S. Insane Persons §§ 8, 11, 35.

25 Am. Jur. 1, Guardian and Ward, generally.

Construction and application of pro-

visions of Federal statutes in relation to exemption from claims of creditors of amounts paid as pensions, war risk insurance, compensation, bonus or other relief for veterans. 109 ALR 433.

91-4802. Administrator as party in interest. The administrator shall be a party in interest in any proceeding for the appointment or removal of a guardian or for the removal of the disability of minority or mental incapacity of a ward, and in any suit or other proceeding affecting in any manner the administration by the guardian of the estate of any present or former ward whose estate includes assets derived in whole or in part from benefits heretofore or hereafter paid by the veterans' administration. Not less than fifteen (15) days prior to hearing in such matter notice in writing of the time and place thereof shall be given by mail (unless waived in writing) to the office of the veterans' administration having jurisdiction over the area in which any such suit or any such proceeding is pending.

History: En. Sec. 2, Ch. 58, L. 1943.

91-4803. Application. Whenever, pursuant to any law of the United States or regulation of the veterans' administration, it is necessary, prior to payment of benefits, that a guardian be appointed, the appointment may be made in the manner hereinafter provided. The court may appoint a guardian of the estate of the ward, a guardian of the person of the ward or a guardian of both the person and the estate of the ward.

History: En. Sec. 3, Ch. 58, L. 1943.

91-4804. Limitation on number of wards. No person other than a bank or trust company shall be guardian of more than five wards at one time, unless all the wards are members of one family. Upon presentation of a petition by an attorney of the veterans' administration or other interested person, alleging that a guardian is acting in a fiduciary capacity for more than five wards as herein provided and requesting his discharge for that reason, the court, upon proof substantiating the petition, shall require a final accounting forthwith from such guardian and shall discharge him from guardianships in excess of five and forthwith appoint a successor.

History: En. Sec. 4, Ch. 58, L. 1943.

91-4805. Appointment of guardians. (1) A petition for the appointment of a guardian may be filed by any relative or friend of the ward or by any person who is authorized by law to file such a petition. If there is no person so authorized or if the person so authorized refuses or fails to file such a petition within thirty (30) days after mailing of notice by the veterans' administration to the last known address of the person, if any, indicating the necessity for the same, a petition for appointment may be filed by any resident of this state.

(2) The petition for appointment shall set forth the name, age, place of residence of the ward, the name and place of residence of the nearest relative, if known, and the fact that the ward is entitled to receive benefits payable by or through the veterans' administration and shall set forth the amount of moneys then due and the amount of probable future payments.

(3) The petition shall also set forth the name and address of the person or institution, if any, having actual custody of the ward and the name, age, relationship, if any, occupation and address of the proposed guardian and if the nominee is a natural person, the number of wards for whom the nominee is presently acting as guardian. Notwithstanding any law as to priority of persons entitled to appointment, or the nomination in the petition, the court may appoint some other individual or a bank or trust company as guardian, if the court determines it is for the best interest of the ward.

(4) In the case of a mentally incompetent ward the petition shall show that such ward has been rated incompetent by the veterans' administration on examination in accordance with the laws and regulations governing the veterans' administration.

History: En. Sec. 5, Ch. 58, L. 1943.

91-4806. Evidence of necessity for guardian of infant. Where a petition is filed for the appointment of a guardian for a minor, a certificate of the administrator or his authorized representative, setting forth the age of such minor as shown by the records of the veterans' administration and the fact that the appointment of a guardian is a condition precedent to the payment of any moneys due the minor by the veterans' administration shall be prima facie evidence of the necessity for such appointment.

History: En. Sec. 6, Ch. 58, L. 1943.

91-4807. Evidence of necessity for guardian for incompetent. Where a petition is filed for the appointment of a guardian for a mentally incompetent ward, a certificate of the administrator or his duly authorized representative, that such person has been rated incompetent by the veterans' administration on examination in accordance with the laws and regulations governing such veterans' administration and that the appointment of a guardian is a condition precedent to the payment of any moneys due such ward by the veterans' administration, shall be prima facie evidence of the necessity for such appointment.

History: En. Sec. 7, Ch. 58, L. 1943.

91-4808. Notice. Upon the filing of a petition for the appointment of a guardian under this act, notice shall be given to the ward, to such other persons, and in such manner as is provided by the general law of this state, and also to the veterans' administration as provided by this act.

History: En. Sec. 8, Ch. 58, L. 1943.

91-4809. Bond. (1) Upon the appointment of a guardian, he shall execute and file a bond to be approved by the court in an amount not less than the estimated value of the personal estate and anticipated income of the ward during the ensuing year. The bond shall be in the form and be conditioned as required of guardians appointed under the general guardianship laws of this state. The court may from time to time require the guardian to file an additional bond.

(2) Where a bond is tendered by a guardian with personal sureties, there shall be at least two such sureties and they shall file with the court a certificate under oath which shall describe the property owned, both real and personal, and shall state that each is worth the sum named in the bond

as the penalty thereof over and above all his debts and liabilities and the aggregate of other bonds on which he is principal or surety and exclusive of property exempt from execution. The court may require additional security or may require a corporate surety bond, the premium thereon to be paid from the ward's estate.

History: En. Sec. 9, Ch. 58, L. 1943.

91-4810. Petitions and accounts, notices and hearings. (1) Every guardian, who has received or shall receive on account of his ward any moneys or other thing of value from the veterans' administration shall file with the court annually, on the anniversary date of the appointment, in addition to such other accounts as may be required by the court, a full, true, and accurate account under oath of all moneys or other things of value so received by him, all earnings, interest or profits derived therefrom and all property acquired therewith and of all disbursements therefrom, and showing the balance thereof in his hands at the date of the account and how invested.

(2) The guardian, at the time of filing any account, shall exhibit all securities or investments held by him to an officer of the bank or other depository wherein said securities or investments are held for safekeeping or to an authorized representative of the corporation which is surety on his bond, or to the judge or clerk of a court of record in this state, or, upon request of the guardian or other interested party, to any other reputable person designated by the court, who shall certify in writing that he has examined the securities or investments and identified them with those described in the account, and shall note any omissions or discrepancies. If the depository is the guardian, the certifying officer shall not be the officer verifying the account. The guardian may exhibit the securities or investments to the judge of the court, who shall endorse on the account and copy thereof a certificate that the securities or investments shown therein as held by the guardian were each in fact exhibited to him and that those exhibited to him were the same as those shown in the account, and noting any omission or discrepancy. That certificate and the certificate of an official of the bank in which are deposited any funds for which the guardian is accountable, showing the amount on deposit, shall be prepared and signed in duplicate and one of each shall be filed by the guardian with his account.

(3) At the time of filing in the court any account, a certified copy thereof and a signed duplicate of each certificate filed with the court shall be sent by the guardian to the office of the veterans' administration having jurisdiction over the area in which the court is located. A signed duplicate or a certified copy of any petition, motion or other pleading, pertaining to an account, or to any matter other than an account, and which is filed in the guardianship proceedings or in any proceedings for the purpose of removing the disability of minority or mental incapacity, shall be furnished by the person filing the same to the proper office of the veterans' administration. Unless hearing be waived in writing by the attorney of the veterans' administration, and by all other persons, if any, entitled to notice, the court shall fix a time and place for the hearing on the account, petition, motion or other pleading not less than fifteen (15) days nor more than thirty (30)

days from the date same is filed, unless a different available date be stipulated in writing. Unless waived in writing, written notice of the time and place of hearing shall be given the veterans' administration office concerned and the guardian and any others entitled to notice not less than fifteen (15) days prior to the date fixed for the hearing. The notice may be given by mail in which event it shall be deposited in the mails not less than fifteen (15) days prior to said date. The court, or clerk thereof, shall mail to said veterans' administration office a copy of each order entered in any guardianship proceeding wherein the administrator is an interested party.

(4) If the guardian is accountable for property derived from sources other than the veterans' administration, he shall be accountable as is or may be required under the applicable law of this state pertaining to the property of minors or persons of unsound mind who are not beneficiaries of the veterans' administration, and as to such other property shall be entitled to the compensation provided by such law. The account for other property may be combined with the account filed in accordance with this section.

History: En. Sec. 10, Ch. 58, L. 1943.

91-4811. Penalty for failure to account. If any guardian shall fail to file with the court any account as required by this act, or by an order of the court, when any account is due or within thirty (30) days after citation issues as provided by law, or shall fail to furnish the veterans' administration a true copy of any account, petition or pleading as required by this act, such failure may in the discretion of the court be ground for his removal.

History: En. Sec. 11, Ch. 58, L. 1943.

91-4812. Compensation of guardians. Compensation payable to guardians shall be based upon services rendered and shall not exceed five percent (5%) of the amount of moneys received during the period covered by the account. In the event of extraordinary services by any guardian, the court, upon petition and hearing thereon may authorize reasonable additional compensation therefor. A copy of the petition and notice of hearing thereon shall be given the proper office of the veterans' administration in the manner provided in the case of hearing on a guardian's account or other pleading. No commission or compensation shall be allowed on the moneys or other assets received from a prior guardian nor upon the amount received from liquidation of loans or other investments.

History: En. Sec. 12, Ch. 58, L. 1943.

91-4813. Investments. Every guardian shall invest the surplus funds of his ward's estate in such securities or property as authorized under the laws of this state but only upon prior order of the court; except that the funds may be invested, without prior court authorization, in direct unconditional interest-bearing obligations of this state or of the United States and in obligations the interest and principal of which are unconditionally guaranteed by the United States. A signed duplicate or certified copy of the petition for authority to invest shall be furnished the proper office of the veterans' administration, and notice of hearing thereon shall be given said office as provided in the case of hearing on a guardian's account.

History: En. Sec. 13, Ch. 58, L. 1943.

91-4814. Maintenance and support. A guardian shall not apply any portion of the income or the estate for the support or maintenance of any person other than the ward, the spouse and the minor children of the ward, except upon petition to and prior order of the court after a hearing. A signed duplicate or certified copy of such petition shall be furnished the proper office of the veterans' administration and notice of hearing thereon shall be given said office as provided in the case of hearing on a guardian's account or other pleading.

History: En. Sec. 14, Ch. 58, L. 1943.

91-4815. Purchase of home for ward. (1) The court may authorize the purchase of the entire fee simple title to real estate in this state in which the guardian has no interest, but only as a home for the ward, or to protect his interest, or (if he is not a minor) as a home for his dependent family. Such purchase of real estate shall not be made except upon the entry of an order of the court after hearing upon verified petition. A copy of the petition shall be furnished the proper office of the veterans' administration and notice of hearing thereon shall be given said office as provided in the case of hearing on a guardian's account.

(2) Before authorizing such investment the court shall require written evidence of value and of title and of the advisability of acquiring such real estate. Title shall be taken in the ward's name. This section does not limit the right of the guardian on behalf of his ward to bid and to become the purchaser of real estate at a sale thereof pursuant to decree of foreclosure of lien held by or for the ward, or at a trustee's sale, to protect the ward's right in the property so foreclosed or sold; nor does it limit the right of the guardian, if such be necessary to protect the ward's interest and upon prior order of the court in which the guardianship is pending, to agree with co-tenants of the ward for a partition in kind, or to purchase from co-tenants the entire undivided interests held by them, or to bid and purchase the same at a sale under a partition decree, or to compromise adverse claims of title to the ward's realty.

History: En. Sec. 15, Ch. 58, L. 1943.

91-4816. Copies of public records to be furnished. When a copy of any public record is required by the veterans' administration to be used in determining the eligibility of any person to participate in benefits made available by the veterans' administration, the official custodian of such public record shall without charge provide the applicant for such benefits or any person acting on his behalf or the authorized representative of the veterans' administration with a certified copy of such record.

History: En. Sec. 16, Ch. 58, L. 1943.

91-4817. Discharge of guardian and release of sureties. In addition to any other provisions of law relating to judicial restoration and discharge of guardian, a certificate by the veterans' administration showing that a minor ward has attained majority, or that an incompetent ward has been rated competent by the veterans' administration upon examination in accordance with law shall be prima facie evidence that the ward has attained majority, or has recovered his competency. Upon hearing after notice as provided by this act and the determination by the court that the ward has attained ma-

jority or has recovered his competency, an order shall be entered to that effect, and the guardian shall file a final account. Upon hearing after notice to the former ward and to the veterans' administration as in case of other accounts, upon approval of the final account, and upon delivery to the ward of the assets due him from the guardian, the guardian shall be discharged and his sureties released.

History: En. Sec. 17, Ch. 58, L. 1943.

91-4818. Commitment to veterans' administration or other agency of United States government. (1) Whenever, in any proceeding under the laws of this state for the commitment of a person alleged to be of unsound mind or otherwise in need of confinement in a hospital or other institution for his proper care, it is determined after such adjudication of the status of such person as may be required by law that commitment to a hospital for mental disease or other institution is necessary for safekeeping or treatment and it appears that such person is eligible for care or treatment by the veterans' administration or other agency of the United States government, the court, upon receipt of a certificate from the veterans' administration or such other agency showing that facilities are available and that such person is eligible for care or treatment therein, may commit such person to said veterans' administration or other agency. The person whose commitment is sought shall be personally served with notice of the pending commitment proceeding in the manner as provided by the law of this state; and nothing in this act shall affect his right to appear and be heard in the proceedings. Upon commitment, such person, when admitted to any facility operated by any such agency within or without this state shall be subject to the rules and regulations of the veterans' administration or other agency. The chief officer of any facility of the veterans' administration or institution operated by any other agency of the United States to which the person is so committed shall with respect to such person be vested with the same powers as superintendents of state hospitals for mental diseases within this state with respect to retention of custody, transfer, parole or discharge. Jurisdiction is retained in the committing or other appropriate court of this state at any time to inquire into the mental condition of the person so committed, and to determine the necessity for continuance of his restraint, and all commitments pursuant to this act are so conditioned. The court shall have power to order commitment to and confinement in a hospital or other institution for his proper care, including a proper hospital or other institution of the veterans' administration or other agency of the United States, either within or without the state of Montana, and the court shall have continuing jurisdiction in all such cases.

(2) The judgment or order of commitment by a court of competent jurisdiction of another state or of the District of Columbia, committing a person to the veterans' administration, or other agency of the United States government for care or treatment shall have the same force and effect as to the committed person while in this state as in the jurisdiction in which is situated the court entering the judgment or making the order; and the courts of the committing state, or of the District of Columbia, shall be deemed to have retained jurisdiction of the person so committed for the purpose of inquiring into the mental condition of such person, and of de-

termining the necessity for continuance of his restraint, as is provided in subsection (1) of this section with respect to persons committed by the courts of this state. Consent is hereby given to the application of the law of the committing state or district in respect to the authority of the chief officer of any facility of the veterans' administration, or of any institution operated in this state by any other agency of the United States to retain custody, or transfer, parole or discharge the committed person.

(3) Upon receipt of a certificate of the veterans' administration or such other agency of the United States that facilities are available for the care or treatment of any person heretofore committed to any hospital for the insane or other institution for the care or treatment of persons similarly afflicted and that such person is eligible for care or treatment, the superintendent of the institution may cause the transfer of such person to the veterans' administration or other agency of the United States for care or treatment. Upon effecting any such transfer, the committing court or proper officer thereof shall be notified thereof by the transferring agency. No person shall be transferred to the veterans' administration or other agency of the United States if he be confined pursuant to conviction of any felony or misdemeanor or if he has been acquitted of the charge solely on the ground of insanity, unless prior to transfer the court or other authority originally committing such person shall enter an order for such transfer after appropriate motion and hearing.

Any person transferred as provided in this section shall be deemed to be committed to the veterans' administration or other agency of the United States pursuant to the original commitment.

History: En. Sec. 18, Ch. 58, L. 1943.

91-4819. Liberal construction. This act shall be so construed to make uniform the law of those states which enact it.

History: En. Sec. 19, Ch. 58, L. 1943.

91-4820. Short title. This act may be cited as the "Uniform Veterans' Guardianship Act."

History: En. Sec. 20, Ch. 58, L. 1943.

91-4821. Modification of prior laws. All acts or parts of acts relating to beneficiaries of the veterans' administration inconsistent with this act are hereby repealed. Except where inconsistent with this act, the laws of this state relating to guardian and ward and the judicial practice relating thereto, including the right to trial by jury and the right of appeal, shall be applicable to such beneficiaries and their estates.

History: En. Sec. 22, Ch. 58, L. 1943.

91-4822. Application of act. The provisions of this act relating to surety bonds and the administration of estates of wards shall apply to all "income" and "estate" as defined in section 91-4801 whether the guardian shall have been appointed under this act or under any other law of this state, special or general, prior or subsequent to the enactment hereof.

History: En. Sec. 23, Ch. 58, L. 1943.

CHAPTER 49

GUARDIAN'S POWERS AND DUTIES

- Section 91-4901. Guardian to pay debts of ward out of ward's estate.
 91-4902. Guardian to recover debts due his ward, and represent him.
 91-4903. Guardian to manage his estate, maintain ward and sell real estate.
 91-4904. Maintenance, support and education of ward—how enforced.
 91-4905. May assent to partition of real estate.
 91-4906. Guardian to return inventory of estate of ward—appraisers to be appointed—like proceedings when other property acquired.
 91-4907. Settlement of guardians' accounts.
 91-4908. Allowance of accounts of joint guardians.
 91-4909. Expenses and compensation of guardians.
 91-4910. Mortgage or lease of ward's real property.
 91-4911. Procedure to mortgage or lease.

91-4901. (10417) Guardian to pay debts of ward out of ward's estate.

Every guardian appointed under the provisions of this chapter, whether for a minor or any other person, must pay all just debts due from the ward, out of his personal estate, and the income of his real estate, if sufficient; if not, then out of his real estate, upon obtaining an order for the sale thereof and disposing of the same in the manner provided in this Title for the sale of real estate of decedents.

History: En. Sec. 367, p. 335, L. 1877; re-en. Sec. 367, 2nd Div. Rev. Stat. 1879; re-en. Sec. 367, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2980, C. Civ. Proc. 1895; re-en. Sec. 7769, Rev. C. 1907; re-en. Sec. 10417, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1768.

Division Compiled Statutes 1887, in Hughes v. Goodale, 26 M 93, 101, 66 P 702; Pethybridge v. First State Bk. of Livingston, 75 M 173, 179, 243 P 569.

References

Cited or applied as section 367, Second

Guardian and Ward \S 67.

39 C.J.S. Guardian and Ward \S 63, 103.

25 Am. Jur. 51, Guardian and Ward, \S 78.

91-4902. (10418) Guardian to recover debts due his ward, and represent him.

Every guardian must settle all accounts of the ward, and demand, sue for, and receive all debts due to him, or may, with the approbation of the court or judge, compound for the same and give discharge to the debtor, on receiving a fair and just dividend of his estate and effects; and he must appear for and represent his ward in all legal suits and proceedings, unless another person be appointed for that purpose.

History: En. Sec. 368, p. 335, L. 1877; re-en. Sec. 368, 2nd Div. Rev. Stat. 1879; re-en. Sec. 368, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2981, C. Civ. Proc. 1895; re-en. Sec. 7770, Rev. C. 1907; re-en. Sec. 10418, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1769.

powers were suspended, and he and his surety, for prior as well as prospective defaults, were liable therefor, and under this section, not entitled to discharge until upon completion of his administration he has paid over all accumulated sums due from him. Mitchell v. Columbia Casualty Co., 111 M 88, 93, 106 P 2d 344.

Cross-Reference

Actions for minors conducted by, sec. 64-114.

Guardian Liable For Accumulated Rentals Due From Himself to His Ward

Where a guardian occupied residence property of which he and his ward were equal half owners, it was the guardian's duty to collect the rent due his ward from himself accrued to time of his appointment, again at the time his bond became effective, and at all times until his

When Guardian's Right to Conduct Suit Ceases

When a ward reaches his majority, under the due process clauses of both the federal (fifth amendment; fourteenth amendment, sec. 1), and state (art. III, sec. 27) constitutions, and by sec. 93-2115, he has the right to control his own litigation and select his own attorney, and under sec. 93-2121, when the matter is brought to the court's attention, proceed-

ings should be stayed until counsel is shown to have been re-employed by the former ward, since a person's rights may not be litigated without his authority. *Mitchell v. McDonald*, 114 M 292, 298, 302, 136 P 2d 536.

91-4903. (10419) Guardian to manage his estate, maintain ward and sell real estate. Every guardian must manage the estate of his ward frugally and without waste, and apply the income and profits thereof, as far as may be necessary, for the comfortable and suitable maintenance of the ward and his family, if there be any; and if such income and profits be insufficient for that purpose, the guardian may sell the real estate, upon obtaining an order of the court or judge therefor, as provided, and must apply the proceeds of such sale, as far as may be necessary, for the maintenance and support of the ward and his family, if there be any.

History: En. Sec. 369, p. 335, L. 1877; re-en. Sec. 369, 2nd Div. Rev. Stat. 1879; re-en. Sec. 369, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2982, C. Civ. Proc. 1895; re-en. Sec. 7771, Rev. C. 1907; re-en. Sec. 10419, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1770.

Cross-References

Action against guardian for waste, sec. 93-6102.

Conversion, larceny, sec. 94-2715.

Operation and Effect

A guardian who, without an order of court, loaned the funds of the ward on an interest-bearing note, was properly directed to account for the interest due thereon at the rate of final settlement, even though the ward refused to accept the note, which was then due, in lieu of cash. In re *Allard Guardianship*, 49 M 219, 223, 141 P 661.

91-4904. (10420) Maintenance, support and education of ward—how enforced. When the guardian has advanced, for the necessary maintenance, support, or education of his ward, an amount not disproportionate to the value of his estate or his condition of life, and the same is made to appear to the satisfaction of the court or judge, by proper vouchers and proofs, the guardian must be allowed credit therefor in his settlements. Whenever a guardian fails, neglects, or refuses to furnish suitable or necessary maintenance, support, or education for his ward, the court or judge may order him to do so, and enforce such order by proper process. Whenever any third person, at his request, supplies a ward with such suitable and necessary maintenance, support, or education, and it is shown to have been done after refusal or neglect of the guardian to supply the same, the court or judge may direct the guardian to pay therefor out of the estate, and enforce such payment by due process.

History: En. Sec. 370, p. 336, L. 1877; re-en. Sec. 370, 2nd Div. Rev. Stat. 1879; re-en. Sec. 370, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2983, C. Civ. Proc. 1895; re-en. Sec. 7772, Rev. C. 1907; re-en. Sec. 10420, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1771.

References

Barbarich v. Chicago etc. Ry. Co. et al., 92 M 1, 11, 9 P 2d 797.

Guardian and Ward—33.

39 C.J.S. *Guardian and Ward* §§ 70, 73, 78.

28 Am. Jur. 49, *Guardian and Ward*, § 75.

Id. A guardian must account for all accumulations from the use of his ward's funds, and will, under no circumstances, be permitted to profit from their use.

Id. A guardian or other trustee has no moral or legal right to mingle trust funds with his own private property, or to profit by the use of the funds belonging to the cestui que trust.

References

Cited or applied as section 369, Second Division Compiled Statutes 1887, in *Hughes v. Goodale*, 26 M 93, 101, 66 P 702.

Guardian and Ward—30 (1), 37, 77.

39 C.J.S. *Guardian and Ward* §§ 60, 62, 63, 69, 70, 76, 107, 108, 141.

25 Am. Jur. 48, *Guardian and Ward*, §§ 72-80.

Operation and Effect

Where the appointment of a guardian of his then wife, an incompetent, was declared invalid upon restoration of his ward to capacity, after six years' service as guardian, he was during that time a guardian de facto and as such subject to all the duties and liabilities of a guardian and having acted in good faith in the belief that he was a guardian de jure, entitled to credit for such expenditures made for the ward as would have been allowed had his appointment been legal. *Kelly v. Kelly et al.*, 89 M 229, 235, 297 P 470.

Id. While it is the better practice for a guardian to obtain an order allowing expenditures of his ward's funds, it is not necessary that he do so, but if he acts without an order he assumes the risk of having his claims therefor disallowed in an action for an accounting, in which the court must determine whether the expenditures were reasonable, necessary and proper, the burden of making such showing resting upon the guardian.

91-4905. (10421) May assent to partition of real estate. The guardian may join in and assent to a partition of the real estate of the ward, whenever such assent may be given by any person.

History: En. Sec. 371, p. 336, L. 1877; re-en. Sec. 371, 2nd Div. Rev. Stat. 1879; re-en. Sec. 371, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2984, C. Civ. Proc. 1895; re-en. Sec. 7773, Rev. C. 1907; re-en. Sec. 10421, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1772.

Guardian and Ward \Rightarrow 30 (1), 58, 148.

39 C.J.S. Guardian and Ward §§ 60, 62, 63, 92, 161.

25 Am. Jur., Guardian and Ward, p. 43, §§ 66 et seq.; p. 110, §§ 179 et seq.

Right of guardian to expend principal of ward's estate for maintenance and support. 5 ALR 632.

Right and obligation of guardian other than parent in respect of services rendered by, or board or services furnished to, ward. 64 ALR 692.

Right of guardian to allowance for expenditures prior to appointment. 67 ALR 1405.

Care required of trustee or guardian with respect to retaining securities coming into his hands as assets of the estate. 77 ALR 505 and 112 ALR 355.

Right of court or guardian to use funds of incompetent for benefit of others than incompetent. 160 ALR 1435.

Cross-Reference

Consent of guardian to partition without action, sec. 93-6351.

Guardian and Ward \Rightarrow 38.

39 C.J.S. Guardian and Ward §§ 74, 76.

91-4906. (10422) Guardian to return inventory of estate of ward—appraisers to be appointed—like proceedings when other property acquired. Every guardian must return to the court an inventory of the estate of his ward within three months after his appointment, and annually thereafter. When the value of the estate exceeds the sum of one hundred thousand dollars, semi-annual returns must be made to the court. The court or judge may, upon application made for that purpose by any person, compel the guardian to render an account to the court of the estate of his ward. The inventories and accounts so to be returned or rendered must be sworn to by the guardian. All the estate of the ward described in the first inventory must be appraised by appraisers appointed, sworn, and acting in the manner provided for regulating the settlement of the estate of decedents. Such inventory, with the appraisement of the property therein described, must be recorded by the clerk of the court in a proper book kept in his office for that purpose. Whenever any other property of the estate of any ward is discovered, not included in the inventory of the estate already returned, and whenever any other property has been succeeded to, or acquired by any ward, or for his benefit, the like proceedings must be had for the return and appraisement thereof that are herein provided in relation to the first inventory and return.

History: En. Sec. 372, p. 336, L. 1877; re-en. Sec. 372, 2nd Div. Rev. Stat. 1879; re-en. Sec. 372, 2nd Div. Comp. Stat. 1887; amd. Sec. 2985, C. Civ. Proc. 1895; re-en.

Sec. 7774, Rev. C. 1907; re-en. Sec. 10422, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1773.

Operation and Effect

This section was enacted to be obeyed, and a failure to return any inventory whatever is a flagrant violation of the guardian's trust. In re Allard Guardianship, 49 M 219, 225, 141 P 661.

Where a guardian fails to return into court inventories of the estate in his charge

as provided by this section, or render his account to the court for allowance as required by the succeeding section, the court may, in its discretion, disallow fees to his guardian and those paid or contracted to be paid by him to his counsel as penalty for such failure. In re Cuffe's Estate, 63 M 399, 408, 207 P 640.

Guardian and Ward \S 32.

39 C.J.S. Guardian and Ward \S 77.

91-4907. (10423) Settlement of guardians' accounts. The guardian must, upon the expiration of a year from the time of his appointment, and as often thereafter as he may be required, present his account to the court for settlement and allowance. The court shall thereupon appoint a day for the settlement of said account and the clerk shall give notice thereof by posting notices in three public places in the county, setting forth the name of the guardianship proceeding and of the guardian and the time and place appointed for the settlement of the account. The court may order such further notice to be given as it may deem proper.

History: En. Sec. 373, p. 337, L. 1877; re-en. Sec. 373, 2nd Div. Rev. Stat. 1879; re-en. Sec. 373, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2986, C. Civ. Proc. 1895; re-en. Sec. 7775, Rev. C. 1907; re-en. Sec. 10423, R. C. M. 1921; amd. Sec. 1, Ch. 3, L. 1947. Cal. C. Civ. Proc. Sec. 1774.

Cross-Reference

Failure to file reports, penalty, sec. 94-3501.

Operation and Effect

It is remissness of duty, where a period of more than thirteen years has elapsed without any report having been rendered by the guardian or required by the court. In re Allard Guardianship, 49 M 219, 225, 141 P 661.

Id. Where a guardian of minors, within little more than a year after his appointment, withdraws from his accounts as guardian about thirty thousand dollars in round numbers, and is asked many years afterward as to the purpose for which he gave a particular check, it is no explanation for him to say, "I do not know." It is his duty to be able to say for what purpose the money was used, and to present vouchers for it.

Id. The allowance of attorney's fees on final settlement of a guardian's account is in the court's discretion, and its action will not be disturbed in the absence of a clear abuse thereof.

This district court has jurisdiction, under this section, over the subject-matter of the account of a guardian, and may decree a settlement; and its decree is not void because of the fact that the court erroneously determined matters foreign to what

was then before it; but, after exercising its jurisdiction by rendering such decree, it is without power, of its own motion, to set that decree aside. State ex rel. McHatton v. District Court, 55 M 324, 328, 176 P 608. See also State ex rel. Smith v. District Court, 55 M 602, 606, 179 P 831.

The decree of settlement by a guardian may, upon proper application by a party vested with an interest in the ward's estate, be subjected to amendment. State ex rel. McHatton v. District Court, 55 M 324, 328, 176 P 608.

Where a guardian fails to return into court inventories of the estate in his charge as provided by the preceding section, or render his account to the court for allowance as required by this section, the court may, in its discretion, disallow fees to his guardian and those paid or contracted to be paid by him to his counsel as penalty for such failure. In re Cuffe's Estate, 63 M 399, 408, 207 P 640.

Guardian and Ward \S 137.

39 C.J.S. Guardian and Ward $\S\S$ 143-145.

25 Am. Jur. 99, Guardian and Ward, $\S\S$ 159 et seq.

Refusal or failure of executor, administrator, guardian, conservator, trustee, receiver, or other fiduciary to pay over, or account for, funds, as contempt. 134 ALR 927, in part supplementing 60 ALR 322.

Conclusiveness and effect of settlement of annual or intermediate accounts of guardian of infant or incompetent. 99 ALR 996.

Accounting by guardian, executor, administrator, or trustee as a necessary condition of action on his bond. 119 ALR 83.

91-4908. (10424) Allowance of accounts of joint guardians. When an account is rendered by two or more joint guardians, the court or judge may, in its or his discretion, allow the same upon the oath of any of them.

History: En. Sec. 374, p. 337, L. 1877; re-en. Sec. 374, 2nd Div. Rev. Stat. 1879; re-en. Sec. 374, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2987, C. Civ. Proc. 1895; re-en. Sec. 7776, Rev. C. 1907; re-en. Sec. 10424, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1775. Guardian and Ward \S 145. 39 C.J.S. Guardian and Ward $\S\S$ 153, 154, 157.

91-4909. (10425) Expenses and compensation of guardians. Every guardian must be allowed the amount of his reasonable expenses incurred in the execution of his trust, and he must also have such compensation for his services as the court or judge in which his accounts are settled deems just and reasonable.

History: En. Sec. 375, p. 337, L. 1877; re-en. Sec. 375, 2nd Div. Rev. Stat. 1879; re-en. Sec. 375, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2988, C. Civ. Proc. 1895; re-en. Sec. 7777, Rev. C. 1907; re-en. Sec. 10425, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1776.

Operation and Effect

This section contemplates a faithful management of the estate by the guardian, and, while a mere technical breach of duty not resulting in injury to the ward will not ordinarily justify a court in withholding compensation altogether, a flagrant violation of the duties of the trust will do so. In re Allard Guardianship, 49 M 219, 225, 141 P 661.

Id. Where a guardian not only failed

for more than thirteen years to render the annual account required by statute, or make any inventory, but mingled guardianship funds with his own, giving checks for large amounts of his ward's money for purposes which he was unable to disclose, the court properly denied him compensation for his services.

References

In re Cuffe's Estate, 63 M 399, 409, 207 P 640; Kelly v. Kelly et al., 89 M 229, 235, 297 P 470.

Guardian and Ward \S 150.

39 C.J.S. Guardian and Ward \S 164.

25 Am. Jur. 109, Guardian and Ward, $\S\S$ 177-184.

91-4910. (10426) Mortgage or lease of ward's real property. Whenever it appears to the court or judge to be for the advantage of the ward or his estate to raise money upon a note or notes to be secured by a mortgage upon all or any part of the real property of the ward, or to make a lease of said real property, or any part thereof, the court or judge, as often as occasion shall arise in the administration of any such estate, may, on a petition, notice, and hearing, as provided for in the following section, authorize, empower, and direct the guardian to mortgage or lease such real estate or any part thereof, and to execute a note or notes to be secured by such mortgage.

History: En. Sec. 1, Ch. 48, L. 1905; re-en. Sec. 7778, Rev. C. 1907; amd. Sec. 1, Ch. 59, L. 1921; re-en. Sec. 10426, R. C. M. 1921.

Guardian and Ward \S 44, 45.

39 C.J.S. Guardian and Ward $\S\S$ 69, 80, 81.

25 Am. Jur. 72, Guardian and Ward, $\S\S$ 112-120.

Constitutionality of statute authorizing

guardian to sell or lease land of ward. 4 ALR 1552.

Power of court or guardian as to mortgaging infant's real property. 95 ALR 839.

Power to lease or to authorize lease of infant's land beyond minority or guardianship. 121 ALR 962.

Power of guardian to agree to, or of court to approve, voluntary partition between infant or incompetent and cotenant. 157 ALR 755.

91-4911. (10427) Procedure to mortgage or lease. To obtain an order to mortgage or lease such real estate, the proceedings to be taken and the effect thereof must be as follows:

1. The guardian, or any person interested in the estate of the ward, shall file a verified petition showing, in the case of an application to mortgage real property, the following matters: The particular purpose or purposes for which it is proposed to make the mortgage, which shall be either to pay the debts, costs, and charges of maintenance, charges of administration, or to pay, reduce, extend, or renew some lien or mortgage already subsisting on said realty, or some part thereof, or for the purpose of benefiting or improving the real estate of the ward; a statement of such debts, charges, costs of administration, or liens or mortgages to be paid, reduced, extended, or renewed, or the purpose and advisability of improving the real estate, as the case may be; the advantage that may accrue to the estate from raising money, the amount proposed to be raised, together with the general description of the property proposed to be mortgaged, and the names of the ward and next of kin, if any, so far as known to the petitioner. In the case of an application to lease, said petitioner shall show the advantage that may accrue to the estate from giving the lease; a general description of the property proposed to be leased; the terms, rental, and general conditions of the proposed lease; and the names of the ward and next of kin so far as known to the petitioner.

2. Thereafter the same procedure shall be had in all respects as is provided by the laws of Montana relating to the mortgaging or leasing of the real estate of a decedent, and the following sections are hereby expressly made applicable to the mortgaging or leasing of a ward's property by a guardian: section 91-3101, sections 91-3103 to 91-3107 and section 91-3109.

History: En. Sec. 1, Ch. 48, L. 1905; Ch. 59, L. 1921; re-en. Sec. 10427, R. C. M. re-en. Sec. 7779, Rev. C. 1907; amd. Sec. 2, 1921; amd. Sec. 1, Ch. 20, L. 1947.

CHAPTER 50

SALE OF PROPERTY BY GUARDIANS—INVESTMENT OF PROCEEDS

- Section 91-5001. May sell property in certain cases.
 91-5002. Sale of real estate to be made upon order of court.
 91-5003. Application of proceeds of sales.
 91-5004. Investments of proceeds of sales.
 91-5005. Order for sale—how obtained.
 91-5006. Notice to next of kin—how given.
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 91-5008. Hearing of application.
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 91-5011. Order of sale to specify, what.
 91-5012. Bond for selling real estate.
 91-5013. Proceedings to conform to certain provisions of code.
 91-5014. Limit of order of sale.
 91-5015. Conditions of sales of real estate of minor heirs—bond and mortgage to be given for deferred payments.
 91-5016. Court may order the investment of money of the ward.

91-5001. (10428) May sell property in certain cases. When the income of an estate under guardianship is insufficient to maintain the ward and his family, or to maintain and educate the ward, when a minor, his guardian may sell his real or personal estate for that purpose, upon obtaining an order therefor.

History: En. Sec. 376, p. 337, L. 1877; re-en. Sec. 376, 2nd Div. Rev. Stat. 1879; re-en. Sec. 376, 2nd Div. Comp. Stat. 1887; re-en. Sec. 3000, C. Civ. Proc. 1895; re-en. Sec. 7780, Rev. C. 1907; re-en. Sec. 10428, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1777.

Conversion

Where a court order was void in authorizing exchange of wards' property and empowering guardian to mortgage for the difference, delivery of the wards' property never divested them of their title thereto, and when they received no benefits from the sale under foreclosure of the mortgage, they were not required to restore any benefits as a condition precedent to recover the value of their property in action for conversion. *Alexander v. Windsor*, 107 M 152, 166, 81 P 2d 685.

Exchange of Property and Mortgage for Difference

An order of the district court authorizing a guardian not only to exchange sheep owned by the wards for cattle, but also empowering him to obtain a loan of sufficient funds to pay the difference remaining due to the owner of the cattle and to execute a mortgage on such animals payable in a year, held void on the authority of *Davidson v. Wampler*, 29 M 61, 74 P 82. Ordinarily power to sell does not include power to exchange. *Alexander v. Windsor*, 107 M 152, 166, 81 P 2d 685.

Guardian and Ward

39 C.J.S. Guardian and Ward §§ 107, 108, 141.

25 Am. Jur. 76, Guardian and Ward, §§ 121 et seq.

91-5002. (10429) Sale of real estate to be made upon order of court.

When it appears to the satisfaction of the court or judge, upon the petition of the guardian, that for the benefit of his ward his real estate, or some part thereof, should be sold, or his ward being an insane married woman, and it is necessary for all the parties interested that her dower right be sold, and the proceeds thereof put out at interest, or invested in some productive stock, or in the improvement or security of any other real estate of the ward, his or her guardian may sell the same for such purpose, upon obtaining an order therefor.

History: En. Sec. 377, p. 337, L. 1877; re-en. Sec. 377, 2nd Div. Rev. Stat. 1879; re-en. Sec. 377, 2nd Div. Comp. Stat. 1887; amd. Sec. 3001, C. Civ. Proc. 1895; re-en. Sec. 7781, Rev. C. 1907; re-en. Sec. 10429, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1778.

References

Cited or applied as sec. 377, Second Division Compiled Statutes 1887, in *Hughes v. Goodale*, 26 M 93, 101, 66 P 702.

Guardian and Ward

39 C.J.S. Guardian and Ward §§ 118, 141; 44 C.J.S. Insane Persons §§ 93-97, 100.

25 Am. Jur. 78, Guardian and Ward, §§ 124, 125.

Constitutionality of statute authorizing

guardian to sell or lease land to ward. 4 ALR 1552.

Duty of one purchasing ward's property or loaning money on security of such property, to see that proceeds are properly applied. 56 ALR 195.

Powers of sale as including power to exchange. 63 ALR 1003.

Right of guardian or other fiduciary to purchase property of estate or trust at sale brought about by third persons. 77 ALR 1513.

Proceeds of sale or condemnation of real property of infant or incompetent as real or personal property. 90 ALR 897.

Power of guardian to sell ward's property without order of court. 108 ALR 936.

Improper purpose as invalidating guardian's sale where sale is also for proper purpose. 158 ALR 1438.

91-5003. (10430) Application of proceeds of sales. If the estate be sold for the purposes mentioned in this chapter, the guardian must apply the proceeds of the sale to such purposes, as far as necessary, and put out the residue, if any, on interest, or invest it in the best manner in his power, until the capital is wanted for the maintenance of the ward and his family, or the education of his children, or for the education of the ward when a minor, in which case the capital may be used for that purpose, as far as may be necessary, in like manner as if it had been personal estate of the ward.

History: En. Sec. 378, p. 337, L. 1877;
re-en. Sec. 378, 2nd Div. Rev. Stat. 1879;
re-en. Sec. 378, 2nd Div. Comp. Stat. 1887;
re-en. Sec. 3002, C. Civ. Proc. 1895; re-en.
Sec. 7782, Rev. C. 1907; re-en. Sec. 10430,
R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1779.

Guardian and Ward 30 (1), 53.
39 C.J.S. Guardian and Ward §§ 60, 62,
63, 84.
25 Am. Jur. 89, Guardian and Ward,
§ 145.

91-5004. (10431) Investments of proceeds of sales. If the estate be sold for the purpose of putting out or investing the proceeds, the guardian must make the investment according to his best judgment, or in pursuance of any order that may be made by the court or judge.

History: En. Sec. 379, p. 337, L. 1877;
re-en. Sec. 379, 2nd Div. Rev. Stat. 1879;
re-en. Sec. 379, 2nd Div. Comp. Stat. 1887;
re-en. Sec. 3003, C. Civ. Proc. 1895; re-en.
Sec. 7783, Rev. C. 1907; re-en. Sec. 10431,
R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1780.

Codes, in In re Allard Guardianship, 49
M 219, 223, 141 P 661; In re Welch's Es-
tate, 100 M 47, 52, 45 P 2d 681.

References

Cited or applied as sec. 7783, Revised

Guardian and Ward 53.
39 C.J.S. Guardian and Ward § 84.
25 Am. Jur. 90, Guardian and Ward,
§ 146.

91-5005. (10432) Order for sale—how obtained. To obtain an order of such sale, the guardian must present to the district court or judge of the county in which he was appointed guardian, a verified petition therefor, setting forth the condition of the estate of his ward, and the facts and circumstances on which the petition is founded, tending to show the necessity or expediency of a sale.

History: En. Sec. 380, p. 338, L. 1877;
re-en. Sec. 380, 2nd Div. Rev. Stat. 1879;
re-en. Sec. 380, 2nd Div. Comp. Stat. 1887;
re-en. Sec. 3004, C. Civ. Proc. 1895; re-en.
Sec. 7784, Rev. C. 1907; re-en. Sec. 10432,
R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1781.

Guardian and Ward 86.
39 C.J.S. Guardian and Ward §§ 112, 115.
25 Am. Jur. 80, Guardian and Ward,
§§ 127 et seq.

91-5006. (10433) Notice to next of kin—how given. If it appears to the court or judge from the petition, that it is necessary, or would be beneficial to the ward, that the real estate, or some part of it, should be sold, or that the real and personal estate should be sold, the court or judge must thereupon make an order directing the next of kin of the ward, and all persons interested in the estate, to appear before the court, at a time and place therein specified, not less than four nor more than eight weeks from the time of making such order, to show cause why an order should not be granted for the sale of such estate. If it appear that it is necessary, or would be beneficial to the ward, to sell the personal estate, or some part of it, the court or judge must order the sale to be made.

History: En. Sec. 381, p. 338, L. 1877;
re-en. Sec. 381, 2nd Div. Rev. Stat. 1879;
re-en. Sec. 381, 2nd Div. Comp. Stat. 1887;
re-en. Sec. 3005, C. Civ. Proc. 1895; re-en.
Sec. 7785, Rev. C. 1907; re-en. Sec. 10433,
R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1782.

Guardian and Ward 87.
39 C.J.S. Guardian and Ward § 113.
25 Am. Jur. 81, Guardian and Ward,
§ 130.

91-5007. (10434) Service or publication of order to appear—consent to order of sale. A copy of the order must be personally served on the next of kin of the ward, and on all persons interested in the estate, at least ten days before the hearing of the petition, or must be published at least once a week for two successive weeks in a newspaper printed in the county,

or if there be none printed in the county, then in such newspaper as may be specified by the court or judge in the order. If written consent to making the order of sale is subscribed by all persons interested therein, and the next of kin, notice need not be served or published, and the hearing may be had at any time.

History: En. Sec. 382, p. 338, L. 1877; re-en. Sec. 382, 2nd Div. Rev. Stat. 1879; re-en. Sec. 382, 2nd Div. Comp. Stat. 1887; re-en. Sec. 3006, C. Civ. Proc. 1895; re-en. Sec. 7786, Rev. C. 1907; re-en. Sec. 10434, R. C. M. 1921; amd. Sec. 1, Ch. 73, L. 1927; amd. Sec. 1, Ch. 19, L. 1947. Cal. C. Civ. Proc. Sec. 1783.

91-5008. (10435) Hearing of application. The court or judge, at the time and place appointed in the order, or such other time to which the hearing is postponed, upon proof of the service or publication of the order, must hear and examine the proofs and allegations of the petitioner, and of next of kin, and of all other persons interested in the estate who oppose the application.

History: En. Sec. 383, p. 338, L. 1877; re-en. Sec. 383, 2nd Div. Rev. Stat. 1879; re-en. Sec. 383, 2nd Div. Comp. Stat. 1887; re-en. Sec. 3007, C. Civ. Proc. 1895; re-en. Sec. 7787, Rev. C. 1907; re-en. Sec. 10435, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1784.

Guardian and Ward—88.
39 C.J.S. Guardian and Ward § 117.

91-5009. (10436) Who may be examined on such hearing. On hearing, the guardian may be examined on oath, and witnesses may be produced and examined by either party, and process to compel their attendance and testimony may be issued by the court or judge, in the same manner and with like effect as in other cases provided for in this Title.

History: En. Sec. 384, p. 339, L. 1877; re-en. Sec. 384, 2nd Div. Rev. Stat. 1879; re-en. Sec. 384, 2nd Div. Comp. Stat. 1887; re-en. Sec. 3008, C. Civ. Proc. 1895; re-en. Sec. 7788, Rev. C. 1907; re-en. Sec. 10436, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1785.

91-5010. (10437) Costs to be awarded, to whom. If any person appears and objects to the granting of any order prayed for under the provisions of this chapter, and it appears to the court or judge that either the petition or the objection thereto is sustained, the court or judge may, in granting or refusing the order, award the costs to the party prevailing, and enforce the payment thereof.

History: En. Sec. 385, p. 339, L. 1877; re-en. Sec. 385, 2nd Div. Rev. Stat. 1879; re-en. Sec. 385, 2nd Div. Comp. Stat. 1887; re-en. Sec. 3009, C. Civ. Proc. 1895; re-en. Sec. 7789, Rev. C. 1907; re-en. Sec. 10437, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1786.

Costs—32 (1).
20 C.J.S. Costs §§ 8-10.

91-5011. (10438) Order of sale to specify, what. If, after a full examination, it appears necessary, or for the benefit of the ward, that his real estate, or some part of it, should be sold, the court or judge may grant an order therefor, specifying therein the causes or reasons why the sale is necessary or beneficial, and may, if the same has been prayed for in the petition, order such sale to be made either at public or private sale.

History: En. Sec. 386, p. 339, L. 1877; re-en. Sec. 386, 2nd Div. Rev. Stat. 1879; re-en. Sec. 386, 2nd Div. Comp. Stat. 1887; re-en. Sec. 3010, C. Civ. Proc. 1895; re-en. Sec. 7790, Rev. C. 1907; re-en. Sec. 10438, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1787.

Guardian and Ward—90.
39 C.J.S. Guardian and Ward §§ 118, 141.

91-5012. (10439) Bond for selling real estate. Every guardian authorized to sell real estate must, before the sale, give bond to the ward, with

sufficient sureties, to be approved by the court or judge, with condition to sell the same in the manner, and to account for the proceeds of the sale as provided for in this chapter, and in sections 91-2801 to 91-3108.

History: En. Sec. 387, p. 339, L. 1877; re-en. Sec. 387, 2nd Div. Rev. Stat. 1879; re-en. Sec. 387, 2nd Div. Comp. Stat. 1887; re-en. Sec. 3011, C. Civ. Proc. 1895; re-en. Sec. 7791, Rev. C. 1907; re-en. Sec. 10439, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1788.

Operation and Effect

Upon a misappropriation of funds by the guardian of a minor realized from the sale of real estate, the sureties on the bond are liable therefor, though the condition of the bond is that prescribed by sec. 91-

4608. *Botkin v. Kleinschmidt*, 21 M 1, 52 P 563.

A sale by a guardian duly appointed and qualified, but who omitted to give the special bond required by this section, was not void. *Hughes v. Goodale*, 26 M 93, 95, 66 P 702.

Guardian and Ward ⇨ 92.

39 C.J.S. Guardian and Ward § 121.

25 Am. Jur. 82, Guardian and Ward, § 132.

91-5013. (10440) Proceedings to conform to certain provisions of code.

All the proceedings under the petition of guardians for sales of property of their wards, giving notice, and the hearing of such petitions, granting or refusing the order of sale, directing the sale to be made at public or private sale, reselling the same property, return of sale, and application for confirmation thereof, notice and hearing of such application, making orders rejecting or confirming sales and reports of sales, ordering and making conveyances of property sold, accounting and the settlement of accounts, must be had and made as required by the provisions of sections 91-2801 to 91-2810, sections 91-2901 and 91-2902, section 91-3009, sections 91-3010 to 91-3039 and section 91-3518.

History: En. Sec. 388, p. 340, L. 1877; re-en. Sec. 388, 2nd Div. Rev. Stat. 1879; re-en. Sec. 388, 2nd Div. Comp. Stat. 1887; re-en. Sec. 3012, C. Civ. Proc. 1895; re-en. Sec. 7792, Rev. C. 1907; re-en. Sec. 10440, R. C. M. 1921; amd. Sec. 1, Ch. 6, L. 1947. Cal. C. Civ. Proc. Sec. 1789.

Operation and Effect

This section provides that all the proceedings as to accounting, and the settlement of accounts of guardians, must be had and made as required concerning estate of deceased persons; but this does not make sec. 91-3516, as to the conclusiveness of the settlement of administrators' accounts, applicable to guardians' accounts.

The code does not in terms provide that the settlement of a guardian's intermediate account shall be conclusive. It may, therefore, be said to be merely *prima facie* evidence of its correctness, subject to be inquired into. In *re Kostohris' Estate*, 96 M 226, 234, 29 P 2d 829.

References

Cited or applied as sec. 388, Second Division Compiled Statutes 1887, in *Hughes v. Goodale*, 26 M 93, 95, 66 P 702.

Guardian and Ward ⇨ 80 et seq.

39 C.J.S. Guardian and Ward § 116 et seq.

91-5014. (10441) Limit of order of sale. No order of sale, granted in pursuance of this chapter, continues in force more than one year after granting the same, without a sale being had.

History: En. Sec. 389, p. 340, L. 1877; re-en. Sec. 389, 2nd Div. Rev. Stat. 1879; re-en. Sec. 389, 2nd Div. Comp. Stat. 1887;

re-en. Sec. 3013, C. Civ. Proc. 1895; re-en. Sec. 7793, Rev. C. 1907; re-en. Sec. 10441, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1790.

91-5015. (10442) Conditions of sales of real estate of minor heirs—bond and mortgage to be given for deferred payments. All sales of real estate of wards must be for cash, or for part cash and part deferred payments, the credit in no case to exceed three years from date of sale, as in the discretion of the court or judge is most beneficial to the ward. Guardians

making sales must demand and receive from the purchasers, in case of deferred payments, notes and a mortgage on the real estate sold, with such additional security as the court or judge deems necessary and sufficient to secure the prompt payment of the amounts so deferred, and the interest thereon.

History: En. Sec. 390, p. 340, L. 1877; re-en. Sec. 390, 2nd Div. Rev. Stat. 1879; re-en. Sec. 390, 2nd Div. Comp. Stat. 1887; re-en. Sec. 3014, C. Civ. Proc. 1895; re-en. Sec. 7794, Rev. C. 1907; re-en. Sec. 10442, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1791.

Guardian and Ward—98.
39 C.J.S. Guardian and Ward § 126.
25 Am. Jur. 83, Guardian and Ward, §§ 134 et seq.

91-5016. (10443) Court may order the investment of money of the ward.

The court, on the application of a guardian, or any person interested in the estate of any ward, after such notice to persons interested therein as the court or judge shall direct, may authorize and require the guardian to invest the proceeds of sales, and any other of his ward's money in his hands, in real estate, or in any other manner most to the interest of all concerned therein, and the court or judge may make such other orders, and give such directions, as are needful for the management, investment, and disposition of the estate and effects, as circumstances require.

History: En. Sec. 391, p. 340, L. 1877; re-en. Sec. 391, 2nd Div. Rev. Stat. 1879; re-en. Sec. 391, 2nd Div. Comp. Stat. 1887; re-en. Sec. 3015, C. Civ. Proc. 1895; re-en. Sec. 7795, Rev. C. 1907; re-en. Sec. 10443, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1792.

Conversion

Where a court order was void in authorizing exchange of wards' property and empowering guardian to mortgage for the difference, delivery of the wards' property never divested them of their title thereto, and when they received no benefits from the sale under foreclosure of the mortgage, they were not required to restore any benefits as a condition precedent to recover the value of their property in action for conversion. *Alexander v. Windsor*, 107 M 152, 166, 81 P 2d 685.

Exchange of Property and Mortgage for Difference

An order of the district court authorizing a guardian not only to exchange sheep owned by the wards for cattle, but also empowering him to obtain a loan of sufficient funds to pay the difference remaining due to the owner of the cattle and to execute a mortgage on such animals payable in a year, held void on the authority of *Davidson v. Wampler*, 29 M 61, 74 P 82. *Alexander v. Windsor*, 107 M 152, 165, 81 P 2d 685.

Operation and Effect

While a guardian is not an insurer of the safety of the investments of the ward's money, and a mere error of judgment will not subject him to personal liability for

its loss, if he invests or loans it without an order of court he assumes the entire risk, and will be held to strict accountability, irrespective of the degree of care exercised in the premises. *Kelly v. Kelly et al.*, 89 M 229, 239, 297 P 470.

A guardian making loans of funds of his ward on chattel mortgages without being authorized to do so by an order of court (this section) assumes the risk of loss, and, it appearing on final accounting that principal and interest are uncollectible, the loans are properly chargeable to the guardian. In *re Kostohris' Estate*, 96 M 226, 240, 29 P 2d 829.

Under the facts stated, held guardian not personally liable for funds on certificate of deposit, without order of court, when bank failed, because certificate had matured and funds like a checking account were not beyond guardian's control at time of bank's failure. In *re Welch's Estate*, 100 M 47, 54, 45 P 2d 681.

References

Cited or applied as sec. 7795, Revised Codes, in *In re Allard Guardianship*, 49 M 219, 223, 141 P 661.

25 Am. Jur. 53, Guardian and Ward, §§ 81 et seq.

Power of court to authorize guardian to borrow ward's money. 30 ALR 461.

Liability of guardian or other fiduciary for loss of funds invested, as affected by order of court authorizing the investment. 88 ALR 325.

Liability of guardian for loss of funds deposited in bank in form which discloses trust or fiduciary character. 90 ALR 641.

Right of ward to maintain action independent from his general guardian, on contracts or other obligations entered into by the guardian on ward's behalf. 102 ALR 269.

Effect of beneficiary's consent to acquiescence in, or ratification of, improper investments or loans (including failure to invest) by guardian or other fiduciary. 128 ALR 4.

CHAPTER 51

GUARDIANSHIP OF NONRESIDENTS

- Section 91-5101. Guardians of nonresident persons.
 91-5102. Powers and duties of guardians appointed under preceding section.
 91-5103. Such guardians to give bond.
 91-5104. To what guardianship shall extend.
 91-5105. Removal or sale of nonresident ward's property.
 91-5106. Proceedings on such removal or sale.
 91-5107. Appraisement and sale of property.
 91-5108. Report of sale.
 91-5109. Order of confirmation.
 91-5110. Power of attorney.
 91-5111. Discharge of person in possession.

91-5101. (10444) Guardians of nonresident persons. When a person liable to be put under guardianship, according to the provisions of sections 91-4601 to 91-5211, resides without this state and has estate therein, any friend of such person, or any one interested in his estate, in expectancy or otherwise, may apply to the district court of any county in which there is any estate of such absent person, for the appointment of a guardian, and if, after notice given to all interested, in such manner as such court or judge orders, by publication or otherwise, and a full hearing and examination, it appears proper, a guardian for such absent person may be appointed.

History: En. Sec. 392, p. 341, L. 1877; re-en. Sec. 392, 2nd Div. Rev. Stat. 1879; re-en. Sec. 392, 2nd Div. Comp. Stat. 1887; re-en. Sec. 3030, C. Civ. Proc. 1895; re-en. Sec. 7796, Rev. C. 1907; re-en. Sec. 10444, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1793.

References

State v. District Court et al., 73 M 84, 91, 235 P 751.

Guardian and Ward ⇨ 166.
 39 C.J.S. Guardian and Ward §§ 187, 193.
 25 Am. Jur., Guardian and Ward, p. 22, § 25; p. 31, §§ 40, 41.

91-5102. (10445) Powers and duties of guardians appointed under preceding section. Every guardian, appointed under the preceding section, has the same powers and performs the same duties, with respect to the estate of the ward found within this state, and with respect to the person of the ward, if he shall come to reside therein, as are prescribed with respect to any other guardian appointed under this chapter.

History: En. Sec. 393, p. 341, L. 1877; re-en. Sec. 393, 2nd Div. Rev. Stat. 1879; re-en. Sec. 393, 2nd Div. Comp. Stat. 1887; re-en. Sec. 3031, C. Civ. Proc. 1895; re-en.

Sec. 7797, Rev. C. 1907; re-en. Sec. 10445, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1794.

Guardian and Ward ⇨ 168.
 39 C.J.S. Guardian and Ward § 188.

91-5103. (10446) Such guardians to give bond. Every guardian must give bond to the ward, in the manner and with the like conditions as hereinbefore provided for other guardians, except that the provisions respecting the inventory, the disposal of the estate and effects, and the account to be

rendered by the guardian, must be confined to such estate and effects as come to his hands in this state.


History: En. Sec. 394, p. 341, L. 1877; re-en. Sec. 394, 2nd Div. Rev. Stat. 1879; re-en. Sec. 394, 2nd Div. Comp. Stat. 1887; re-en. Sec. 3032, C. Civ. Proc. 1895; re-en. Sec. 7798, Rev. C. 1907; re-en. Sec. 10446, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1795.

91-5104. (10447) To what guardianship shall extend. The guardianship which is first lawfully granted of any person residing without this state extends to all the estate of the ward within this state, and excludes the jurisdiction of the district court of every other county.

History: En. Sec. 395, p. 341, L. 1877; re-en. Sec. 395, 2nd Div. Rev. Stat. 1879; re-en. Sec. 395, 2nd Div. Comp. Stat. 1887; re-en. Sec. 3033, C. Civ. Proc. 1895; re-en. Sec. 7799, Rev. C. 1907; re-en. Sec. 10447, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1796.

91-5105. (10448) Removal or sale of nonresident ward's property. When the guardian and ward are both nonresidents, and the ward is the owner of or entitled to property in this state, which may be removed to another state or territory or foreign country or sold, without conflict with any restriction or limitation thereupon, and without injuring the right of the ward thereto, such property may be removed to the state or territory or foreign country of the residence of the ward, or sold, and the proceeds of the sale thereof removed to such state or territory or foreign country; upon application to the district judge of the county in which the estate of the ward, or the principal part thereof, is situated.

History: En. Sec. 396, p. 342, L. 1877; re-en. Sec. 396, 2nd Div. Rev. Stat. 1879; amd. Sec. 396, 2nd Div. Comp. Stat. 1887; re-en. Sec. 3034, C. Civ. Proc. 1895; re-en. Sec. 7800, Rev. C. 1907; re-en. Sec. 10448, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1797.

Guardian and Ward  168, 169.
39 C.J.S. Guardian and Ward §§ 188, 189.

91-5106. (10449) Proceedings on such removal or sale. The application must be made upon ten days' notice to the resident executor, administrator, or guardian, if there be such, otherwise without notice, and upon such application the nonresident guardian must produce and file a certificate, under the hand of the clerk or judge and seal of the court from which his appointment was derived, showing:

1. A transcript of the record of his appointment;
2. That he has entered upon the discharge of his duties;

3. That he is entitled, by the laws of the state or territory or foreign country of his appointment, to the possession of the estate of his ward; or, must produce and file a certificate, under the hand of the clerk or judge and seal of the court having jurisdiction in the state or territory or foreign country of his residence, of the estate of persons under guardianship, or of the highest court of such state or territory or foreign country, showing that, by the laws of such state or territory or foreign country, the applicant is entitled to the custody of the estate of his ward, without the appointment of any court. The said application shall also contain a description of the property of such ward, together with an estimate of its value. Upon such application, unless good cause to the contrary is shown, the judge must make an order granting such guardian leave to take and remove the property of his ward to the state or territory or foreign country of his residence, or to sell the same, as may be requested or prayed for in said application, which order shall be authority to such guardian

to sue for and receive the property therein described in his own name, for the use and benefit of his ward.

History: En. Sec. 397, p. 342, L. 1877; re-en. Sec. 3035, C. Civ. Proc. 1895; re-en. re-en. Sec. 397, 2nd Div. Rev. Stat. 1879; Sec. 7801, Rev. C. 1907; re-en. Sec. 10449, amd. Sec. 397, 2nd Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1798.

91-5107. (10450) Appraisement and sale of property. Property authorized to be sold under the provisions of the preceding section may be sold at public or private sale, with or without notice, as the order of the district court may direct, and upon such terms as such order may prescribe, but before any sale thereunder, the property must be appraised by three appraisers to be appointed by the judge granting such order, either before or after the issuance of the order of sale, and the property must not be sold for less than ninety per cent. of the appraised value thereof.

History: En. Sec. 397, 2nd Div. Comp. 1895; re-en. Sec. 7802, Rev. C. 1907; re-en. Stat. 1887; re-en. Sec. 3036, C. Civ. Proc. Sec. 10450, R. C. M. 1921.

91-5108. (10451) Report of sale. Upon making the sale of such property, or any part thereof, the guardian shall make a report thereof to the judge, showing the person or persons to whom, and the price or prices for which, the said property, or any part thereof, was sold. Thereupon the judge shall proceed to hear such report, and if the sale appears to have been fairly conducted, and the price or prices obtained appear to be the reasonable market value of the property sold, the judge shall make an order confirming such sale or sales, and directing a proper deed or deeds of real property, or a proper bill of sale or other transfer, conveying the property sold to the purchaser or purchasers.

History: En. Sec. 397, 2nd Div. Comp. 1895; re-en. Sec. 7803, Rev. C. 1907; re-en. Stat. 1887; re-en. Sec. 3037, C. Civ. Proc. Sec. 10451, R. C. M. 1921.

91-5109. (10452) Order of confirmation. A certified copy of each order confirming the sale of real property must be recorded in the office of the county clerk of the county where such real property is situated. The guardian shall make and deliver to the purchaser or purchasers the deed or other conveyance authorized by the said order, and in conformity thereto, and thereupon all right, title, interest, and estate of such ward shall be fully vested in such purchaser or purchasers.

History: En. Sec. 397, 2nd Div. Comp. 1895; re-en. Sec. 7804, Rev. C. 1907; re-en. Stat. 1887; re-en. Sec. 3038, C. Civ. Proc. Sec. 10452, R. C. M. 1921.

91-5110. (10453) Power of attorney. Any guardian mentioned in this and the preceding section may, by power of attorney, executed and acknowledged in the manner provided by law for the execution and acknowledgment of conveyances of real property, empower and authorize any person capable in law of executing a power of attorney for the sale of real estate, as attorney in fact, to do any and all of the things that the guardian himself might otherwise do, and in such case the acts and proceedings of such attorney in fact have the same force and effect as the acts and proceedings of such guardian.

History: En. Sec. 397, 2nd Div. Comp. 1895; re-en. Sec. 7805, Rev. C. 1907; re-en. Stat. 1887; re-en. Sec. 3039, C. Civ. Proc. Sec. 10453, R. C. M. 1921.

91-5111. (10454) Discharge of person in possession. The order mentioned in section 91-5106 is a discharge of the executor or administrator,

local guardian, or other person in whose possession the property may be at the time the order is made, on filing with the court the receipt therefor of the foreign guardian of such absent ward.

History: En. Sec. 398, p. 342, L. 1877; re-en. Sec. 3040, C. Civ. Proc. 1895; re-en. Sec. 398, 2nd Div. Rev. Stat. 1879; Sec. 7806, Rev. C. 1907; re-en. Sec. 10454, re-en. Sec. 398, 2nd Div. Comp. Stat. 1887; R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1799.

CHAPTER 52

GUARDIANSHIP—GENERAL AND MISCELLANEOUS PROVISIONS

- Section 91-5201. Examination of persons suspected of defrauding wards or concealing property.
 91-5202. Removal and resignation of guardian and surrender of estate.
 91-5203. Guardianship—how terminated.
 91-5204. When bonds not required for letters of guardianship.
 91-5205. New bond—when required.
 91-5206. Guardian's bond to be filed—action on.
 91-5207. Limitation of actions on guardian's bond.
 91-5208. Limitation of actions for the recovery of property sold.
 91-5209. More than one guardian of a person may be appointed.
 91-5210. Orders to be entered in minutes—provisions applicable to practice.
 91-5211. Provisions applicable to guardians.

91-5201. (10455) Examination of persons suspected of defrauding wards or concealing property. Upon complaint made to him by any guardian, ward, creditor, or other person interested in the estate, or having a prospective interest therein as heir or otherwise, against any one suspected of having concealed, embezzled, or conveyed away any of the money, goods, or effects, or any instrument in writing belonging to the ward or to his estate, the court or judge may cite such suspected person to appear before such court or judge, and may examine and proceed with him on such charge in the manner provided in sections 91-2101 to 91-2105 with respect to persons suspected of and charged with concealing or embezzling the effects of a decedent.

History: En. Sec. 399, p. 343, L. 1877; re-en. Sec. 399, 2nd Div. Rev. Stat. 1879; re-en. Sec. 399, 2nd Div. Comp. Stat. 1887; re-en. Sec. 3050, C. Civ. Proc. 1895; re-en. Sec. 7807, Rev. C. 1907; re-en. Sec. 10455, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1800.

Guardian and Ward—35.
 39 C.J.S. Guardian and Ward § 74.

91-5202. (10456) Removal and resignation of guardian and surrender of estate. When a guardian, appointed either by the testator or a court or judge, becomes insane or otherwise incapable of discharging his trust, or unsuitable therefor, or has wasted or mismanaged the estate, or failed for thirty days to render an account or make a return, the court or judge may, upon such notice to the guardian as the court or judge may require, remove him and compel him to surrender the estate of the ward to the person found to be lawfully entitled thereto. Every guardian may resign when it appears proper to allow the same; and upon the resignation or removal of a guardian, as herein provided, the court or judge may appoint another in place of the guardian who resigns or was removed.

History: En. Sec. 400, p. 343, L. 1877; re-en. Sec. 400, 2nd Div. Rev. Stat. 1879; re-en. Sec. 400, 2nd Div. Comp. Stat. 1887; re-en. Sec. 3051, C. Civ. Proc. 1895; re-en. Sec. 7808, Rev. C. 1907; re-en. Sec. 10456, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1801.

Guardian and Ward—23, 25.

39 C.J.S. Guardian and Ward §§ 47, 51.
25 Am. Jur. 38, Guardian and Ward,
§§ 55-58.

Liability of sureties on bond of guardian, executor, administrator or trustee for defalcation or deficit occurring before bond was given. 82 ALR 585.

Resignation or removal of executor, administrator, guardian, or trustee, before final administration or termination of trust, as affecting his compensation. 94 ALR 1101.

Right of surety on bond of trustee, executor, administrator, or guardian to terminate liability as regards future defaults of principal. 118 ALR 1261.

Improper handling of funds, investments, or assets as ground for removal of guardian of infant or incompetent. 128 ALR 535.

Necessity and sufficiency of notice to infant or other incompetent of application for appointment of successor to guardian or committee. 138 ALR 1364.

91-5203. (10457) Guardianship—how terminated. The marriage of a minor ward terminates the guardianship of the person of such ward, but not of the estate; and the guardian of an insane or other person may be discharged by the court or judge, when it appears, on the application of the ward, or otherwise, that the guardianship is no longer necessary.

History: En. Sec. 401, p. 343, L. 1877; re-en. Sec. 401, 2nd Div. Rev. Stat. 1879; re-en. Sec. 401, 2nd Div. Comp. Stat. 1887; re-en. Sec. 3052, C. Civ. Proc. 1895; re-en. Sec. 7809, Rev. C. 1907; re-en. Sec. 10457, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1802.

Guardian and Ward—21.

39 C.J.S. Guardian and Ward § 43.

25 Am. Jur. 37, Guardian and Ward,
§§ 53, 54.

91-5204. When bonds not required for letters of guardianship. If, at the time of hearing any application for letters of guardianship, it satisfactorily appears to the court or judge that the assets of the estate for which such letters of guardianship are sought do not warrant the necessity of a bond on the part of the applicant, the court or judge may in its discretion order such letters to issue without bond; but such guardian may at any time afterward, if it appear from any cause necessary or proper, be required to file a bond as in other cases.

History: En. Sec. 1, Ch. 76, L. 1937.

91-5205. (10458) New bond—when required. The court or judge may require a new bond to be given by a guardian whenever such court or judge deems it necessary, and may discharge the existing securities from further liability, after due notice given as such court or judge may direct, when it shall appear that no injury can result therefrom to those interested in the estate.

History: En. Sec. 402, p. 343, L. 1877; re-en. Sec. 402, 2nd Div. Rev. Stat. 1879; re-en. Sec. 402, 2nd Div. Comp. Stat. 1887; re-en. Sec. 3053, C. Civ. Proc. 1895; re-en. Sec. 7810, Rev. C. 1907; re-en. Sec. 10458, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1803.

Division Compiled Statutes 1887, in Hughes v. Goodale, 26 M 93, 101, 66 P 702; Oliveri v. Maroncelli et al., 94 M 476, 481, 22 P 2d 1054.

Guardian and Ward—15.

39 C.J.S. Guardian and Ward §§ 32-36.

References

Cited or applied as sec. 402, Second

91-5206. (10459) Guardian's bond to be filed—action on. Every bond given by a guardian must be filed and preserved in the office of the clerk of the district court, and in case of a breach of condition thereof, may be prosecuted for the use and benefit of the ward, or of any person interested in the estate.

History: En. Sec. 403, p. 344, L. 1877; re-en. Sec. 403, 2nd Div. Rev. Stat. 1879;

re-en. Sec. 403, 2nd Div. Comp. Stat. 1887; re-en. Sec. 3054, C. Civ. Proc. 1895; re-en.

Sec. 7811, Rev. C. 1907; re-en. Sec. 10459, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1804.

When, When Not, Surety Bound by Judgment Against Principal

A surety on a guardian's bond is bound by a judgment against the principal if rendered as a part of probate proceedings because bound by the various notices required to be given in such proceedings; the rule being otherwise where the judgment is rendered in a proceeding not connected with probate proceedings, in which case the surety must be made a party defendant in order to be bound by the judgment. *Janes v. Fidelity & Deposit Company of Maryland*, 112 M 580, 583, 119 P 2d 39.

Guardian and Ward \S 15, 182 (1).

39 C.J.S. Guardian and Ward \S 32-36, 210, 214, 220.

91-5207. (10460) Limitation of actions on guardian's bond. No action can be maintained against the sureties on any bond given by a guardian, unless it be commenced within three years from the discharge or removal of the guardian; but if, at the time of such discharge, the person entitled to bring such action is under any legal disability to sue, the action may be commenced at any time within three years after such disability is removed.

History: En. Sec. 404, p. 344, L. 1877; re-en. Sec. 404, 2nd Div. Rev. Stat. 1879; re-en. Sec. 404, 2nd Div. Comp. Stat. 1887; re-en. Sec. 3055, C. Civ. Proc. 1895; re-en. Sec. 7812, Rev. C. 1907; re-en. Sec. 10460, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1805.

Operation and Effect

The death of a ward is a discharge of the guardian within the meaning of this section. *Berkin v. Marsh*, 18 M 152, 159, 44 P 528.

Id. A legal disability to sue pertains to the person desiring to sue and not to the cause of action, and therefore, though a cause of action on a guardian's bond may not accrue until after the guardian's final accounting, this does not place the administrator of a deceased ward under a disability from the time of the ward's death until the accounting.

Id. The provision of this section, requiring action against the sureties on a guardian's bond to be brought within three years, is a special statute of limitations

25 Am. Jur. 34, Guardian and Ward, \S 47. Leave of court as prerequisite to action on statutory bond. 2 ALR 563.

Invalidity of designation of officer, fiduciary or depository as affecting liability on bond. 18 ALR 274.

Right of sureties on bonds to take advantage of noncompliance with statutory requirement as to approval of bond. 77 ALR 1479.

Liability of sureties on bond of guardian, executor, administrator, or trustee for defalcation or deficit occurring before bond was given. 82 ALR 585.

Right of surety on bond of trustee, executor, administrator, or guardian to terminate liability as regards future defaults of principal. 118 ALR 1261.

Right of surety on bond of trustee, executor, administrator or guardian to terminate liability as regards future defaults of principal. 150 ALR 485.

for the benefit of the sureties, and not for the principal.

An order of court declaring the appointment of a guardian void ab initio (made some ten years after appointment) held equivalent to his discharge, and the special limitation of three years provided by this section becomes a part of the suretyship contract, notwithstanding the order, in an action on the guardian's bond, and contention of the ward that the three year limitation has no application where there never had been a legal relationship of guardian and ward in existence, held not sustainable, the purported guardian having been at least an equitable one. Complaint held sufficient and judgment on demurrer reversed, allowing defendant time to answer. *Janes v. Fidelity & Deposit Company of Maryland*, 112 M 580, 583, 119 P 2d 39.

Guardian and Ward \S 182 (3).

39 C.J.S. Guardian and Ward \S 215.

25 Am. Jur., Guardian and Ward, p. 99, \S 158; p. 102, \S 164.

91-5208. (10461) Limitation of actions for the recovery of property sold. No action for the recovery of any estate sold by a guardian can be maintained by the ward, or by any person claiming under him, unless it is commenced within three years next after the termination of the guardianship, or, when a legal disability to sue exists by reason of minority or otherwise, at the time when the cause of action accrues, within three years next after the removal thereof.

History: En. Sec. 405, p. 344, L. 1877; re-en. Sec. 405, 2nd Div. Rev. Stat. 1879; re-en. Sec. 405, 2nd Div. Comp. Stat. 1887; re-en. Sec. 3056, C. Civ. Proc. 1895; re-en.

Sec. 7813, Rev. C. 1907; re-en. Sec. 10461, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1806.

Guardian and Ward ⇨ 125.

39 C.J.S. Guardian and Ward § 174.

91-5209. (10462) More than one guardian of a person may be appointed.

The court or judge, whenever necessary, may appoint more than one guardian of any person subject to guardianship, who must give bond and be governed and liable in all respects as a sole guardian.

History: En. Sec. 406, p. 344, L. 1877; re-en. Sec. 406, 2nd Div. Rev. Stat. 1879; re-en. Sec. 406, 2nd Div. Comp. Stat. 1887; amd. Sec. 3057, C. Civ. Proc. 1895; re-en.

Sec. 7814, Rev. C. 1907; re-en. Sec. 10462, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1807.

Guardian and Ward ⇨ 71.

39 C.J.S. Guardian and Ward § 194.

91-5210. (10463) Orders to be entered in minutes—provisions applicable to practice. All orders must be entered in the minutes of the court kept for probate proceedings in accordance with the provisions of section 91-4301. The provisions of this Title, relative to the estates of decedents, so far as they relate to the practice in the district court, apply to proceedings under sections 91-4601 to 91-5211.

History: En. Sec. 3058, C. Civ. Proc. 1895; re-en. Sec. 7815, Rev. C. 1907; re-en. Sec. 10463, R. C. M. 1921; amd. Sec. 1, Ch. 8, L. 1947. Cal. C. Civ. Proc. Sec. 1808.

Operation and Effect

In an action to recover on a guardian's bond, in which defendant surety's contention was that the decree of settlement of the guardian's account was not binding upon it because it had not received notice of hearing thereon, held, that posted notice given under sec. 91-3512 (relating to settlement of accounts of executors and administrators made applicable by this section to proceedings in guardianship) was con-

structive notice to defendant, and that the court's recital in the decree of settlement that notice had been given, was sufficient proof of notice. *Oliveri v. Maroncelli et al.*, 94 M 476, 479, 22 P 2d 1054.

References

In re Kostohris' Estate, 96 M 226, 231, 29 P 2d 829; State ex rel. Stimatz v. District Court, 105 M 510, 515, 74 P 2d 8; Mitchell v. McDonald, 114 M 292, 301, 136 P 2d 536.

Courts ⇨ 113.

21 C.J.S. Courts § 142.

91-5211. (10464) Provisions applicable to guardians. The provisions of section 93-8709 are hereby declared to apply to guardians appointed by the court or judge, and to the bonds taken or to be taken from such guardians, and to the sureties on such bonds.

History: En. Sec. 3059, C. Civ. Proc. 1895; re-en. Sec. 7816, Rev. C. 1907; re-en. Sec. 10464, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1809.

References

State ex rel. Stimatz v. District Court, 105 M 510, 515, 74 P 2d 8.

TITLE 92

WORKMEN'S COMPENSATION ACT

- Chapter 1. Industrial accident board—creation and powers, 92-101 to 92-120.
2. Defenses—election to come under act, 92-201 to 92-211.
3. Hazardous occupations to which act applies, 92-301 to 92-306.
4. Meaning of words employed in act, 92-401 to 92-438.
5. Compensation to certain heirs and beneficiaries, 92-501 to 92-508.
6. Claims—liability for injury under different plans of act, 92-601 to 92-614.
7. Compensation for various injuries—amount—payment, 92-701 to 92-715.
8. Miscellaneous regulations—powers of board—rehearings and appeals, 92-801 to 92-843.
9. Compensation plan No. 1, 92-901 to 92-908.
10. Compensation plan No. 2, 92-1001 to 92-1012.
11. Compensation plan No. 3, 92-1101 to 92-1123.
12. Safety provisions, 92-1201 to 92-1222.

CHAPTER 1

INDUSTRIAL ACCIDENT BOARD—CREATION AND POWERS

- Section 92-101. Name of act—what each part to contain.
92-102. Reference to plan numbers.
92-103. "Compensation provisions."
92-104. Industrial accident board—compensation—term and salary.
92-105. Vacancy in office and removal of appointive member.
92-106. Official bonds.
92-107. Treasurer's bond—bond of other members.
92-108. Ex officio members to receive no additional compensation.
92-109. Quorum—powers in case of vacancy—hearings—findings and orders.
92-110. Seal of board.
92-111. Office and furnishings—temporary quarters.
92-112. Secretary—appointment, term, duties—records.
92-113. Other assistants and employees.
92-114. Compensation of officers and employees—term of office and duties.
92-115. Salaries to be paid monthly—approval and auditing.
92-116. Expenses to be paid from what fund.
92-117. Blank forms, minutes and records.
92-118. Reports and bulletins which may be published.
92-119. Fees of board.
92-120. Attorney general legal adviser of board.

92-101. (2816) Name of act—what each part to contain. This act shall be known and may be cited as the workmen's compensation act. Part I (sections 92-101 to 92-843) shall contain those sections which have a general application to the whole of the act, and may be referred to as the "general provisions"; part II (sections 92-901 to 92-908) shall contain those sections which refer to compensation plan number one; part III (sections 92-1001 to 92-1012) shall contain those sections which refer to compensation plan number two; part IV (sections 92-1101 to 92-1123) shall contain those sections which refer to compensation plan number three; part V (sections 92-1201 to 92-1222) shall contain those sections which may be referred to as the "safety provisions."

History: En. Sec. 1, Ch. 96, L. 1915;
re-en. Sec. 2816, R. C. M. 1921.

Absolute Remedy

It is competent for a party to waive

his right to have a cause of action determined by a court before it actually arises, especially where the legislature has provided a substitute remedy, as under the compensation act, which renders his right to relief absolute. *Shea v. North-Butte Min. Co.*, 55 M 522, 536, 179 P 499.

Applicable to County Employees

The workmen's compensation act is applicable to counties and county employees, and as such it is not class legislation, nor is it in violation of the constitutional prohibition against donations to individuals. *Lewis and Clark County v. Industrial Accident Board*, 52 M 6, 12, 155 P 268.

Constitutionality

The workmen's compensation act is not repugnant to the state constitution. *Shea v. North-Butte Min. Co.*, 55 M 522, 179 P 499.

Id. The rule, that a statute will not be declared invalid on constitutional grounds unless its invalidity is made to appear beyond a reasonable doubt, applies with peculiar force where, as in the case of the workmen's compensation act, the statute seems to have been found satisfactory after a four-year period of operation, by those directly affected by it, namely, the employer and the employee.

Id. Inasmuch as the workmen's compensation act becomes binding upon the employer and the employee only at their election, neither may thereafter object to its enforcement, and the fact that the modes in which they may indicate their election are different, does not make it objectionable on the ground that it discriminates against either employer or employee.

Construction of Act

In the construction of the workmen's compensation act, all of its sections, as originally enacted or amended, must be considered together in such manner as to give effect to the act as a whole. *State v. Industrial Acc. Board et al.*, 94 M 386, 387, 23 P 2d 253.

Purpose

The workmen's compensation act was enacted for the benefit of the employee and the act implies that the first duty of the industrial accident board is to administer it so as to give the employee the greatest possible protection consistent with its purposes. *Miller v. Aetna Life Ins. Co.*, 101 M 212, 220, 53 P 2d 704.

Theory of Act

The theory of the workmen's compensation act is that loss occasioned by injury to the workman shall not be borne by him alone, but directly by the indus-

try and indirectly by the public, the same as is the deterioration of the buildings, machinery and other appliances necessary to enable the employer to carry on the particular industry. *Murray Hospital v. Angrove*, 92 M 101, 10 P 2d 577.

To accomplish the purpose for which the workmen's compensation act was passed, to-wit, that the loss occasioned to an employee by reason of an injury, shall not be borne by him alone but directly by the industry and indirectly by the public, its provisions must be liberally construed, but in so construing it the industrial accident board and the courts may not disregard its plain provisions or award compensation in a case for which no provision is made therein. *Kerns v. Anaconda Copper Min. Co.*, 87 M 546, 549, 289 P 563. See, also, *Betor v. National Biscuit Co.*, 85 M 481, 280 P 641, and *Dosen v. East Butte Copper Min. Co.*, 78 M 579, 254 P 880.

Act Does Not Create Cause of Action for Damages

The right to secure compensation for the results of an industrial accident, as provided for in the workmen's compensation act, is not a cause of action for damages for the resulting injury. In determining the amount of an award of compensation under the act, the element of pain and suffering has no place. *Chisholm v. Vocational School for Girls et al.*, 103 M 503, 512, 64 P 2d 838.

Act Does Not Provide Measure of Damages in Tort Action

In action by employee for negligence of employer who had not elected to be bound by the workmen's compensation act, held that the compensation provided by the act is not to be taken as a yardstick to measure plaintiff's damages, since the compensation is not based upon a cause of action for tort and omits entirely the element of pain and suffering. *Chancellor v. Hines Motor Supply Co.*, 104 M 603, 615, 69 P 2d 597.

When Act Becomes Part Of Contract

A contract entered into between a mining company and a hospital for the hospitalization of its employees under the workmen's compensation act (secs. 92-610 et seq.) must be construed in the light of the intent and purpose of the act which became a part of the contract. *Sample v. Murray Hospital*, 103 M 195, 201, 62 P 2d 241.

When Court's Decision On Appeals Mandatory

The industrial accident board is required to obey direction of district court

made in pursuance of the opinion of the supreme court, as against the contention that writ of mandate did not lie since the board's functions in the matter were quasi-judicial, its functions under the remand being ministerial only. *State ex rel. Miller v. Industrial Accident Board*, 102 M 206, 210, 56 P 2d 1087.

References

Cited or applied in *Chenoweth v. Great Northern Ry. Co.*, 50 M 481, 488, 148 P 330; *Page v. New York Realty Co.*, 59 M 305, 310 et seq., 196 P 871; *Kamboris v. Chicago etc. Ry. Co.*, 62 M 88, 203 P 859; *Wirta v. North Butte Mining Co. et al.*, 64 M 279, 285, 210 P 332; *Bruce v. McAdoo*, 65 M 275, 287, 211 P 772; *Black v. Northern Pac. Ry. Co.*, 66 M 538, 214 P 82; *Miller v. Granite County Power Co. et al.*, 66 M 368, 371 et seq., 213 P 604; *Novak v. Industrial Accident Board*, 73 M 196, 235 P 754; *Dosen v. East Butte Copper Min. Co.*, 78 M 579, 254 P 880; *Nicholson v. Roundup Coal Min. Co. et al.*, 79 M 358, 367, 257 P 270; *Moore v. Industrial Accident Fund*, 80 M 136, 259 P 825; *Chmielewska v. Butte & Superior Min. Co.*, 81 M 36, 261 P 616; *London G. & A. Co., Ltd. v. Indus. Acc. Bd.*, 82 M 304, 266 P 1103; *Sullivan v. Anselmo Mining Corp. et al.*, 82 M 543, 268 P 495; *Edwards v. Butte & Superior Min. Co.*, 83 M 122, 270 P 634; *Goodwin v. Elm Orlu Min. Co. et al.*, 83 M 152, 269 P 403; *Herberson v. Great Falls Wood & Coal Co.*, 83 M 527, 273 P 294; *Landeem v. Toole County Refining Co.*, 85 M 41, 277 P 615; *Betor v. National Biscuit Co.*, 85 M 481, 280 P 641; *Loney v. Industrial Accident Board*, 87 M 191, 193, 286 P

408; *Maki v. Anaconda Copper Min. Co.*, 87 M 314, 287 P 170; *Kerns v. Anaconda Copper Min. Co.*, 87 M 546, 289 P 56; *Mulholland v. Butte & Superior Min. Co.*, 87 M 561, 289 P 574; *Industrial Acc. Board v. Brown Bros. L. Co.*, 88 M 375, 292 P 902; *State v. District Court*, 88 M 400, 293 P 291; *Lindblom v. Employers' etc. Assur. Corp.*, 88 M 488, 295 P 1007; *Nelson v. Stukey*, 89 M 277, 300 P 287; *Kearney v. Industrial Acc. Board*, 90 M 228, 1 P 2d 919; *Cogdill v. Aetna Life Ins. Co. et al.*, 90 M 244, 2 P 2d 292; *Radonich v. Anaconda Copper Min. Co.*, 91 M 437, 439, 8 P 2d 658; *Murray Hospital v. Angrove*, 92 M 101, 10 P 2d 577; *Davis v. Industrial Accident Board*, 92 M 503, 15 P 2d 919; *Murphy v. Industrial Accident Board*, 93 M 1, 16 P 2d 705; *State v. Industrial Acc. Board et al.*, 94 M 386, 387, 23 P 2d 253; *Williams v. Brownfield-Canty Co. et al.*, 95 M 364, 368, 26 P 2d 980; *Clark v. Olson*, 96 M 417, 420, 31 P 2d 283; *Paulich v. Republic Coal Co.*, 97 M 224, 33 P 2d 514; *In re Maury et al.*, 97 M 316, 34 P 2d 380; *Anderson v. Amalgamated Sugar Co.*, 98 M 23, 37 P 2d 552; *Birdwell v. Three Forks Portland C. Co.*, 98 M 483, 40 P 2d 43; *Woin v. Anaconda Copper Min. Co.*, 99 M 163, 43 P 2d 662; *McDaniel v. Eagle Coal Co. et al.*, 99 M 309, 43 P 2d 655; *Liest v. U. S. F. & G. Co.*, 100 M 152, 153, 48 P 2d 772; *State ex rel. Missoula v. Holmes*, 100 M 256, 277, 47 P 2d 624; *Sullivan v. Roman Catholic Bishop et al.*, 103 M 117, 120, 61 P 2d 838; *Koppang v. Sevier*, 106 M 79, 90, 75 P 2d 790; *Kelly v. McCabe*, 115 M 530, 534, 146 P 2d 770.

92-102. (2817) Reference to plan numbers. Whenever compensation plans number one, two, or three, or the safety provisions of this act shall be referred to, such reference shall also be held to include all other sections which are applicable to the subject-matter of such reference.

History: En. Sec. 1, Ch. 96, L. 1915;
re-en. Sec. 2817, R. C. M. 1921.

Statutes 179.
59 C.J. Statutes § 567.

92-103. (2818) "Compensation provisions." The "compensation provisions" of this act, whenever referred to, shall be held to include the provisions of compensation plans number one, two, or three, and all other sections of this act applicable to the same, or any part thereof.

History: En. Sec. 1, Ch. 96, L. 1915;
re-en. Sec. 2818, R. C. M. 1921.

Not "Yardstick" For Damages Recoverable Against Employer Not Electing To Come Under Act

In view of the nature of the workmen's compensation act and the fact that the element of pain and suffering is not taken

into consideration in fixing the compensation under the act, the awards allowed under it do not furnish a "yardstick" to measure the damages an injured employee may recover against an employer who did not elect to come under the provisions of the act. *Chancellor v. Hines Motor Supply Co.*, 104 M 603, 615, 69 P 2d 597.

92-104. (2819) Industrial accident board — compensation — term and salary. There is hereby created a board to consist of three members; the commissioner of agriculture, labor, and industry shall be one member; the state auditor shall be one member, and one member shall be appointed by the governor, which board shall be known as the industrial accident board, and shall have the powers, duties, and functions hereinafter conferred. The term of office of the appointed member of the board shall be for four years and until his successor shall have been appointed and qualified. He shall receive an annual salary of five thousand dollars, payable monthly, and shall be chairman of the board.

The board shall elect one of their number as treasurer of the board.

History: En. Sec. 2, Ch. 96, L. 1915; amd. Sec. 1, Ch. 95, L. 1919; amd. Sec. 1, Ch. 254, L. 1921; re-en. Sec. 2819, R. C. M. 1921.

NOTE.—For cases citing workmen's compensation act (secs. 92-101 to 92-1222) as an entirety, see references under section 92-101.

References

Cited or applied as section 2 (a), chapter 96, laws of 1915, before amendment,

in *City of Butte v. Industrial Accident Board*, 52 M 75, 79, 156 P 130; *Bruce v. McAdoo*, 65 M 275, 287, 211 P 772; *Page v. New York Realty Co.*, 59 M 305, 310 et seq., 196 P 871; *Wirta v. North Butte Mining Co. et al.*, 64 M 279, 285, 210 P 332; *State ex rel. Nagle v. Stafford et al.*, 97 M 275, 279, 34 P 2d 372.

Workmen's Compensation 1076 et seq.
71 C.J. *Workmen's Compensation* § 653 et seq.

92-105. (2820) Vacancy in office and removal of appointive member. A vacancy in the office of the appointed member of the board shall be filled in the same manner as the original appointment, but shall only be for the unexpired term of such vacancy. The appointed member shall not be removed except for cause, and after a hearing had before and a finding made by the remaining members of the board, and both of the remaining members of the board must concur in the removal of the appointed member.

History: En. Sec. 2, Ch. 96, L. 1915; re-en. Sec. 2820, R. C. M. 1921.

Workmen's Compensation 1082.
71 C.J. *Workmen's Compensation* § 657 et seq.

92-106. (2821) Official bonds. Each member shall, upon entering upon the duties of his office, execute to the state of Montana and file with the secretary of state a bond in the sum herein prescribed, executed by not less than four responsible sureties, or by some surety company authorized to become sole surety on bonds in the state of Montana, such bond to be approved by the governor, and conditioned that he will faithfully and impartially discharge the duties of his office. Such bonds shall be in addition to any other bonds required by law to be furnished.

History: En. Sec. 2, Ch. 96, L. 1915; re-en. Sec. 2821, R. C. M. 1921.

NOTE.—See following section which fixes the bonds of members and employees of the board other than the treasurer at \$15,000.

See also sec. 6-101 which fixes the bond

of the chairman of the industrial accident board at \$5,000 and that of the chief accountant of the board at \$2,000.

References

State ex rel. Nagle v. Stafford et al., 97 M 275, 279, 34 P 2d 372.

92-107. (2822) Treasurer's bond—bond of other members. The bond of the treasurer of the board shall be in a sum to be fixed by the governor, not less than fifty thousand dollars (\$50,000.00). The bond of each member of the board other than the treasurer shall be in the sum of fifteen thousand

dollars (\$15,000.00). The state board of examiners may, in its discretion, require bonds of other employees of the industrial accident board in such sums as will be commensurate with the amount of funds handled by such employees. Premiums for said bonds shall be paid from the general appropriations for the industrial accident board.

History: En. Sec. 2, Ch. 96, L. 1915; re-en. Sec. 2822, R. C. M. 1921; amd. Sec. 1, Ch. 81, L. 1941; amd. Sec. 1, Ch. 235, L. 1947.

NOTE.—For cases citing workmen's compensation act (secs. 92-101 to 92-1222) as an entirety, see references under section 92-101.

References

Cited or applied as section 2 (d), chapter 96, laws of 1915, in *City of Butte v. Industrial Accident Board*, 52 M 75, 79, 156 P 130; *State ex rel. Nagle v. Stafford et al.*, 94 M 275, 279, 34 P 2d 372.

92-108. (2823) Ex officio members to receive no additional compensation. Neither the commissioner of labor and industry nor the state auditor shall receive any additional compensation for the duties imposed upon them by this act.

History: En. Sec. 2, Ch. 96, L. 1915; re-en. Sec. 2823, R. C. M. 1921.

92-109. (2824) Quorum—powers in case of vacancy—hearings—findings and orders. A majority of the board shall constitute a quorum for the transaction of any business. A vacancy on the board shall not impair the right of the remaining members to perform all of the duties and exercise all the powers and authority of the board. The act of the majority of the board when in session as a board shall be deemed to be the act of the board, but any investigation, inquiry, or hearing which the board has power to undertake or to hold, may be undertaken or held by or before any member thereof, or any examiner or referee appointed by the board for that purpose. Every finding, order, decision, or award made by any commissioner, examiner, or referee, pursuant to such investigation, inquiry, or hearing, when approved and confirmed by the board and ordered filed in its office, shall be deemed to be the finding, order, decision, or award of the board.

History: En. Sec. 2, Ch. 96, L. 1915; re-en. Sec. 2824, R. C. M. 1921.

92-110. (2825) Seal of board. The board shall have a seal bearing the following inscription: "Industrial Accident Board, State of Montana, Seal." The seal shall be affixed to all writs and authentications of copies of records, and to such other instruments as the board shall direct. All courts shall take judicial notice of said seal.

History: En. Sec. 2, Ch. 96, L. 1915; re-en. Sec. 2825, R. C. M. 1921.

References

ter 96, laws of 1915, in *City of Butte v. Industrial Accident Board*, 52 M 75, 79, 156 P 130.

Cited or applied as section 2 (g), chap-

92-111. (2826) Office and furnishings—temporary quarters. The board shall keep its principal office in the capital of the state, and shall be provided with suitable rooms, necessary office furniture, stationary, and other supplies. For the purpose of holding sessions in other places the board shall have power to rent temporary quarters.

History: En. Sec. 2, Ch. 96, L. 1915; re-en. Sec. 2826, R. C. M. 1921.

Workmen's Compensation 1090.
71 C.J. *Workmen's Compensation* § 668.

92-112. (2827) Secretary — appointment, term, duties — records. The board shall appoint a secretary who shall hold office at the pleasure of the board. It shall be the duty of the secretary to keep a full and true record of all the proceedings of the board; to issue all necessary processes, writs, warrants, and notices which the board is required or authorized to issue, and generally to perform such other duties as the board may prescribe.

History: En. Sec. 2, Ch. 96, L. 1915; re-en. Sec. 2827, R. C. M. 1921.

References

Cited or applied as section 2 (i), chapter 96, laws of 1915, in *City of Butte v. Industrial Accident Board*, 52 M 75, 79, 156 P 130.

NOTE.—For cases citing workmen's compensation act (secs. 92-101 to 92-1222) as an entirety, see references under section 92-101.

Workmen's Compensation—1084.

71 C.J. Workmen's Compensation § 661.

92-113. (2828) Other assistants and employees. The board shall employ such assistants and other employees as it may deem necessary to carry out the provisions of this act.

History: En. Sec. 2, Ch. 96, L. 1915; re-en. Sec. 2828, R. C. M. 1921.

References

Cited or applied as section 2 (j), chapter 96, laws of 1915, in *City of Butte v. Industrial Accident Board*, 52 M 75, 79, 156 P 130.

NOTE.—For cases citing workmen's compensation act (secs. 92-101 to 92-1222) as an entirety, see references under section 92-101.

92-114. (2829) Compensation of officers and employees—term of office and duties. All officers and employees of the board shall receive such compensation for their services as may be fixed by the board, shall hold office at the pleasure of the board, shall perform such duties as are imposed on them by law or by the board.

History: En. Sec. 2, Ch. 96, L. 1915; re-en. Sec. 2829, R. C. M. 1921.

92-115. (2830) Salaries to be paid monthly—approval and auditing. The salaries of members of the board, secretary, and every other person holding office or employment under the board, as fixed by law or by the board, shall be paid monthly after being approved by the board upon claims therefor to be audited and approved by the state board of examiners.

History: En. Sec. 2, Ch. 96, L. 1915; re-en. Sec. 2830, R. C. M. 1921.

92-116. (2831) Expenses to be paid from what fund. All expenses incurred by the board pursuant to the provisions of this act, including the actual and necessary traveling and other expenses and disbursements of the members thereof, its officers and employees incurred while on business of the board, either within or without the state, shall, unless otherwise provided in this act, be paid from the industrial administration fund, after being approved by the board upon claims therefor to be audited and approved by the state board of examiners.

History: En. Sec. 2, Ch. 96, L. 1915; re-en. Sec. 2831, R. C. M. 1921.

States—127.

59 C.J. States § 378.

92-117. (2832) Blank forms, minutes and records. The board shall cause to be printed such blank forms as it shall deem requisite to facilitate or promote the efficient administration of this act. It shall provide a book

in which shall be entered the minutes of all its proceedings, a book of record in which shall be recorded all awards made by the board, and such other books or records as it shall deem requisite for the purpose and efficient administration of this act. All such records are to be kept in the office of the board.

History: En. Sec. 2, Ch. 96, L. 1915;
re-en. Sec. 2832, R. C. M. 1921.

References

NOTE.—For cases citing workmen's compensation act (secs. 92-101 to 92-1222) as an entirety, see references under section 92-101.

Cited or applied as section 2 (n), chapter 96, laws of 1915, in *City of Butte v. Industrial Accident Board*, 52 M 75, 79, 156 P 130.

92-118. (2833) Reports and bulletins which may be published. The board shall have the power and authority to publish and distribute at its discretion from time to time, in addition to its annual report, such further reports and bulletins covering its operations, proceedings, and matters relative to its work as it may deem advisable.

History: En. Sec. 2, Ch. 96, L. 1915;
re-en. Sec. 2833, R. C. M. 1921.

92-119. (2834) Fees of board. The board shall have power and authority to charge and collect the following fees:

1. For copies of papers and records not required to be certified or otherwise authenticated by the board, fifteen cents for each folio; for certified copies of official documents and orders filed in its office, or of the evidence taken at any hearing, twenty cents for each folio.

2. To fix and collect reasonable charges for publications issued under its authority.

3. The fees charged and collected under this section shall be paid monthly into the treasury of the state, to the credit of the industrial administration fund, and shall be accompanied by a detailed statement thereof.

History: En. Sec. 2, Ch. 96, L. 1915;
re-en. Sec. 2834, R. C. M. 1921.

92-120. (2835) Attorney general legal adviser of board. The attorney general shall be the legal adviser of the board, and shall represent it in all proceedings whenever so requested by the board or any member thereof.

And it is further provided that the board may, in the investigation and defense of cases under plan three of the workmen's compensation act, employ such other attorney or legal adviser, as it deems necessary, and pay for the same out of the industrial accident fund.

History: En. Sec. 2, Ch. 96, L. 1915; Attorney General 6.
re-en. Sec. 2835, R. C. M. 1921; amd. Sec. 7 C.J.S. Attorney General §§ 5, 6.
1, Ch. 162, L. 1937.

CHAPTER 2

DEFENSES—ELECTION TO COME UNDER ACT

- Section 92-201. Defenses excluded in personal injury action—negligence of employee—fellow-servant—assumption of risk.
- 92-202. Defenses not excluded in personal injury action against employer in non-hazardous occupation and certain other occupations.
- 92-203. Employers not liable for death or injury other than herein defined—employees who elect not to come under law.

- 92-204. Election of employer and employee to come under act—action against third party causing injury.
- 92-205. Defenses available.
- 92-206. Compensation plan No. 3 exclusive, etc., when a public corporation is the employer—duty of governing body of corporations.
- 92-207. Employers engaged in hazardous industries—election.
- 92-208. Employee engaged in hazardous occupation bound by what plan—election.
- 92-209. Employer shall make election before being bound—employee presumed to have elected.
- 92-210. Election at any time.
- 92-211. Compensation when employer has not elected.

92-201. (2836) Defenses excluded in personal injury action—negligence of employee—fellow-servant—assumption of risk. In an action to recover damages for personal injuries sustained by an employee in the course of his employment, or for death resulting from personal injuries so sustained, it shall not be a defense:

- (1) That the employee was negligent, unless such negligence was wilful;
- (2) That the injury was caused by the negligence of a fellow employee;
- (3) That the employee had assumed the risks inherent in, incident to, or arising out of his employment, or arising from the failure of the employer to provide and maintain a reasonably safe place to work, or reasonably safe tools or appliances.

History: En. Sec. 3, Ch. 96, L. 1915; re-en. Sec. 2836, R. C. M. 1921.

Application To Employers Not Electing

Held, that this section applies not only to those employers who elect to come under the provisions of the workmen's compensation act, but also to those not so electing; the plaintiff in the latter case being, however, bound to prove that the injury for which he sues was caused by the employer's negligence. *Chancellor v. Hines Motor Supply Co.*, 104 M 603, 608, 69 P 2d 597.

Operation and Effect

Under the provisions of the workmen's compensation act, negligence of the employer is not an essential element of his liability for injuries sustained by the employee arising out of his employment, nor are the defenses of contributory negligence and assumption of risk available to the employer in avoidance of compensation. *Nicholson v. Roundup Coal Min. Co. et al.*, 79 M 358, 376, 257 P 270.

Where a dentist also operated for gain a large apartment house, in the construction of an addition to which plaintiff employee was injured, the former's contention, in an action for damages, that the latter's employment was "casual," i.e., not in the usual course of trade, business or profession of defendant, and that therefore the provision of this section making unavailable certain defenses to an employer, did not apply to him, held not maintainable, since a person may

be engaged in more than one business, trade or profession; the building of the addition to the apartment house business, plaintiff's employment was in the usual course of that business. *Nelson v. Stukeby*, 89 M 277, 285, 300 P 287.

"Wilful"

"Wilful" negligence on part of an employee suing his employer not protected by the workmen's compensation act and which negligence the defendant employer may allege in defense under subdivision 1 of this section, is said to be the doing of an act recklessly while the doer thereof is conscious that he is likely to be injured, or with a wanton and reckless disregard of the consequences, or in a conscious and deliberate violation of an accepted and reasonable rule; it embraces the doing deliberately and intentionally and with design and purpose. *Chancellor v. Hines Motor Supply Co.*, 104 M 603, 613, 69 P 2d 597.

References

Miller v. Granite County Power Co. et al., 66 M 368, 372, 213 P 604; *Bruce v. McAdoo*, 65 M 275, 288, 211 P 772; *Vesel v. Jardine Mining Co.*, 110 M 82, 99, 100 P 2d 75; *Hardware Mutual Cas. Co. v. Butler et al.*, 116 M 73, 80, 148 P 2d 563.

Workmen's Compensation—2110 et seq.
71 C.J. Workmen's Compensation § 1510 et seq.

Civil consequences of failure to insure, or otherwise secure compensation. 21 ALR 1428.

92-202. (2837) Defenses not excluded in personal injury action against employer in nonhazardous occupation and certain other occupations. The provisions of section 92-201 shall not apply to actions to recover damages for personal injuries sustained by household and domestic servants or those employed in farming, dairying, agricultural, viticultural, and horticultural, stock or poultry raising, or engaged in the operation and maintenance of steam railroads conducting interstate commerce, or persons whose employment is of a casual nature.

History: En. Sec. 3, Ch. 96, L. 1915; re-en. Sec. 2837, R. C. M. 1921; amd. Sec. 1, Ch. 121, L. 1925.

Casual Employment

An employer who elects not to come under the provisions of the workmen's compensation act, may, under this section, invoke the common-law defenses of contributory negligence, negligence of a fellow-servant and assumption of risk in an action for personal injuries sustained by an employee, if the injuries were sustained while the latter was engaged in an employment of a casual nature, even though such employment was hazardous within the meaning of the act. *Miller v. Granite County Power Co. et al.*, 66 M 368, 372 et seq., 213 P 604.

Employment is not "casual," within the meaning of the workmen's compensation act (sec. 92-436 and secs. 92-202 and 92-411, as amended, Ch. 121, laws of 1925), in the sense that injuries sustained during the course of such employment are not compensable, if the employment was in the usual course of trade or business of the employer. *Industrial Acc. Board v. Brown Bros. Lumber Co.*, 88 M 375, 380, 292 P 902.

Id. An injury is received in the course of employment, under the above rule, when it occurs while the workman is doing the duty which he is employed to perform, though the employment be but temporary or casual.

Id. A truck driver was directed by his employer to deliver a load of cement in a neighboring town; on his return the truck became mired in a mud-hole from which, without help, he was unable to extricate it; he so informed the employer by phone, who advised him that the truck was needed in his business and to procure help. The person procured to assist him

was injured in an attempt to extricate the truck. Held, under the above rules, that under the circumstances the helper was employed to work for the truck driver's employer in the course of the latter's business, that the fact that the helper's employment was but temporary or casual was, therefore, of no importance, and hence that the injury sustained by the helper was compensable under the provisions of the workmen's compensation act.

Where a dentist also operated for gain a large apartment house, in the course of an addition to which plaintiff employee was injured, the former's contention, in an action for damages, that the latter's employment was "casual," i.e., not in the usual course of trade, business or profession of defendant, and that therefore the provision of section 92-201 (workmen's compensation act), making unavailable certain defenses to an employer, did not apply to him (this section), held not maintainable, since a person may be engaged in more than one business, trade or profession; the building of the addition to the apartment house having been in furtherance of defendant's apartment house business, plaintiff's employment was in the usual course of that business. *Nelson v. Stukey*, 89 M 277, 285, 300 P 287.

Employee within provisions applicable to "operation of railroads." 7 ALR 1160.

Application of act to employees engaged in farming. 7 ALR 1296; 13 ALR 955; 35 ALR 208; 43 ALR 954; 107 ALR 977 and 140 ALR 399.

What is casual employment? 33 ALR 1452; 60 ALR 1195 and 107 ALR 934.

Workmen's Compensation Act as applicable to motor carriers and their employees engaged in interstate commerce. 148 ALR 873.

92-203. (2838) Employers not liable for death or injury other than herein defined—employees who elect not to come under law. Any employer who elects to pay compensation as provided in this act shall not be subject to the provisions of section 92-201, nor shall such employer be subject to any other liability whatsoever for the death of or personal injury to any employee except as in this act provided; and, except as specifically provided in this act, all causes of action, actions at law, suits in equity, and proceedings

whatever, and all statutory and common-law rights and remedies for and on account of such death of, or personal injury to, any such employee are hereby abolished; provided, that section 92-201 shall not apply to actions brought by an employee who has elected not to come under this act, or by his representatives, for damages for personal injuries or death, against an employer who has elected to come under this act.

History: En. Sec. 3, Ch. 96, L. 1915; re-en. Sec. 2838, R. C. M. 1921.

Applicable Although Minor Unlawfully Employed

Where a 13-year-old girl, unlawfully employed under section 10-201 as operator of a passenger elevator was killed in the performance of her duties, and had failed to serve upon the employer a written notice of her election not to be bound by workmen's compensation act under this and the following section, she being an "employee" under section 92-411 expressly including minors "whether lawfully or unlawfully employed," held, that her insured employer was immune from common-law or statutory suits for damages brought by her mother as administratrix. *Tarrant v. Helena Building & Realty Co.*, 116 M 319, 322, 156 P 2d 168.

Exclusive Remedy

That the compensation act of this state, in so far as it provides compensation to an injured employee for injuries received from an accident growing out of and in the course of his employment is exclusive of all other remedies is unquestionable. *Wirta v. North Butte Mining Co. et al.*, 64 M 279, 287, 210 P 332. See, also, *Bruce v. McAdoo*, 65 M 275, 287, 211 P 772.

In an action for injuries sustained by a city street cleaner while engaged in the usual course of his employment by being run over by an automobile prior to the enactment of chapter 138, laws of 1933 (sections 92-204 and 92-205 of this code), granting an employee protected by the workmen's compensation act a right of action against a third person through

whose negligence he was injured, held, under prior decisions to the same effect, that under the compensation act as in force at the time of the accident (this section and section 92-204), the remedy afforded the injured employee by the act was exclusive, plaintiff's common-law right to sue such third person having been abolished. (*Mr. Justice Angstman, dissenting*). *Clark v. Olson*, 96 M 417, 426, 31 P 2d 283.

Minors Required to Give Notice—Capacity to Contract Immaterial

Section 92-411 defining the term "employee" to include "minors, whether lawfully or unlawfully employed" dispenses with the necessity of a valid contract of employment, making wholly immaterial the age or competency of the minor and the capacity of the minor to contract, as well as the lawfulness of the object or of the employment, rendering employers insured under the act immunity from common-law or statutory suits for damages, even where injury or death results to such minor when rendering service or labor in violation of section 10-201, the Child Labor Law. *Tarrant v. Helena Building & Realty Co.*, 116 M 319, 323, 156 P 2d 168.

References

Miller v. Granite County Power Co. et al., 66 M 368, 373, 213 P 604; *Chancellor v. Hines Motor Supply Co.*, 104 M 603, 609, 69 P 2d 597.

Employee's right to elect between compensation act and action at law against employer. 117 ALR 515.

92-204. (2839) Election of employer and employee to come under act—action against third party causing injury. Where both the employer and employee have elected to come under this act, the provisions of this act shall be exclusive, and such election shall be held to be a surrender by such employer and such employee, as between themselves, of their right to any other method, form or kind of compensation, or determination thereof, or to any other compensation, or kind of determination thereof, or cause of action, action at law, suit in equity, or statutory or common-law right or remedy, or proceeding whatever, for or on account of any personal injury to or death of such employee, except as such rights may be hereinafter specifically granted; and such election shall bind the employee himself, and

in case of death shall bind his personal representative, and all persons having any right or claim to compensation for his injury or death, as well as the employer, and those conducting his business during liquidation, bankruptcy or insolvency. Provided, that whenever such employee shall receive an injury while performing the duties of his employment and such injury or injuries, so received by such employee, are caused by the act or omission of some persons or corporations other than his employer, then such employee, or in case of his death his heirs or personal representatives, shall, in addition to the right to receive compensation under the workmen's compensation act, have a right to prosecute any cause of action he may have for damages against such persons or corporations, causing such injury. In the event said employee shall prosecute an action for damages for or on account of such injuries so received, he shall not be deprived of his right to receive compensation but such compensation shall be received by him in addition to and independent of his right to bring action for such damages, provided, that in the event said employee, or in case of his death, his personal representative, shall bring such action, then the employer or insurance carrier paying such compensation shall be subrogated only to the extent of either one-half ($\frac{1}{2}$) of the gross amount paid at time of bringing action and the amount eventually to be awarded to such employee as compensation under the workmen's compensation law, or one-half ($\frac{1}{2}$) of the amount recovered and paid to such employee in settlement of, or by judgment in said action, whichever is the lesser amount. All expense of prosecuting such action shall be borne by the employee, or if the employee shall fail to bring such action or make settlement of his cause of action within six (6) months from the time such injury is received, the employer or insurance carrier who pays such compensation may thereafter bring such action and thus become entitled to all of the amount received from the prosecution of such action up to the amount paid the employee under the workmen's compensation act, and all over that amount shall be paid to the employee. In the event that the amount of compensation payable under this act shall not have been fully determined at the time such employee shall receive settlement of his action, prosecuted as aforesaid, then the industrial accident board shall determine what proportion of such settlement the insurance carrier would be entitled to receive under its right of subrogation and such finding of the board shall be conclusive. Such employer or insurance carrier shall have a lien on such cause of action for one-half ($\frac{1}{2}$) of the amount paid to such employee as compensation under the workmen's compensation act or one-half ($\frac{1}{2}$) of the amount recovered and paid to such employee in settlement of, or by judgment in said action, whichever is the lesser amount, which shall be a first lien thereon.

History: En. Sec. 3, Ch. 96, L. 1915; re-en. Sec. 2839, R. C. M. 1921; amd. Sec. 1, Ch. 138, L. 1933; amd. Sec. 1, Ch. 230, L. 1943; amd. Sec. 2, Ch. 235, L. 1947.

NOTE.—For cases citing workmen's compensation act (secs. 92-101 to 92-1222) as an entirety, see references under section 92-101.

Actions Against Third Parties

Where a coal mining company and its

employees had elected to operate under plan 3 of the workmen's compensation act, and plaintiff employee received injuries in the course of his employment at the company's plant because of a defective brake on a car furnished his employer by defendant railroad company, held, prior to amendment of 1933, the remedy afforded him by the provisions of the compensation act was exclusive, depriving him of the right to maintain action for damages against the railroad

company for its negligent failure to have the car equipped with a reasonably safe appliance. *Black v. Northern Pac. Ry. Co.*, 66 M 538, 549, 214 P 82.

One employed as foreman by corporation performing pumping and other services for railway company, which owned and had possession of gasoline pump house and equipment therein, could not maintain action against latter company for injuries sustained as result of fall when he stepped into water filled hole in pump house floor near pump after accepting compensation from employer under workmen's compensation act, as cause of injuries was directly connected with and necessarily followed as incident of his regular employment. *Sullivan v. Northern Pacific Ry. Co.*, 104 F 2d 517, 24 Fed. Supp. 822, 824.

Under this section, and secs. 93-2810 and 93-2824, the widow of an employee insured under plan 3 of the workmen's compensation act and killed in the performance of his duties, after being awarded compensation under the facts stated, had the right, as heir and administratrix, to bring a negligence action against the driver of the car which killed her husband and employ an attorney to conduct the case, the latter being given a first lien upon his client's cause of action by section 93-2120, which cannot be affected by any settlement between the parties before or after judgment. *Hardware Mutual Casualty Co. v. Butler*, 116 M 73, 80, 148 P 2d 563.

Where a city employee was heating a metal hose using gasoline and where the can of gasoline caught fire and the city employee threw it accidentally on to an asphalt contractor's truck driver who had just delivered some asphalt to the city's repairmen, it was held that under this statute the injured truck driver, though receiving compensation, could sue the city as a third party within the compensation act, though both city and contractor were insured under plan three. *Sullivan v. City of Butte*, 117 M 215, 218, 157 P 2d 479.

Where telephone company employed taxicab company to transport daily employees to and from military fort where employees were working, switchboard operator who was injured through negligence of taxicab driver was entitled to maintain action for damages against taxicab company though both telephone company and its employees were subject to workmen's compensation act since the cause of injury had no direct connection with regular employment and did not arise out of or necessarily follow as an incident thereof. *Hoffman v. Johnson*, — M —, 181 P 2d 792, 794.

Attorneys' Fees

The term expense as used in this section does not ordinarily include attorneys' fees. The provision that an injured employee prosecuting an action shall bear all expense incident thereto, does not mean that the legislature thereby intended to amend section 93-2120, giving attorneys a first lien on the proceeds of settlement in the hands of whomsoever such proceeds may come. Where an attorney is employed on a contingent fee of one-half of the amount recovered, subrogation applies only to the amount actually paid on claimant's half, and not to the attorney's share. *Hardware Mutual Casualty Co. v. Butler*, 116 M 73, 80, 86, 148 P 2d 563.

Exclusive Remedy

When an employee has elected to become subject to the provisions of the workmen's compensation act, neither he nor his personal representatives in case of the former's death may thereafter prosecute an action for damages against the employer for an injury suffered by him during the course of his employment. *Shea v. North Butte Min. Co.*, 55 M 522, 532, 179 P 499.

The workmen's compensation act, in so far as it provides compensation to an injured employee for injuries received from an accident growing out of and in the course of his employment, is exclusive of all other remedies. *Wirta v. North Butte Mining Co. et al.*, 64 M 279, 285, 210 P 332.

Plaintiff's intestate, an employee at a coal mine tippie, was killed on the premises of his employer, while assisting to move a box-car on a spur-track leading to the tippie for the purpose of loading, the accident having been caused by the sudden stopping of the car due to a brakeshoe becoming loose and falling on the track in front of the moving car. His widow claimed and was paid compensation for his death under the provisions of the workmen's compensation act. His administrator thereupon brought action against the director-general of railroads to recover damages for negligence in furnishing the coal company a defective car. Held, prior to amendment of 1933, that the action did not lie, the provisions of the compensation act with relation to compensation being exclusive of any other remedy, except where the injury was caused by the negligence of a third person away from the plant of the employer, in which case alone the employee or his beneficiaries in case of death are given the right of election whether to take under the act or seek damages from such third person. *Bruce v. McAdoo*, 65 M 275, 287, 211 P 722.

Injecting Matter Of Insurance—Rule Held Not Violated, In Action Against Third Party

Where plaintiff's counsel in opening statement advised jury that under the law one-half of the award to plaintiff under the workmen's compensation act would have to be returned to the state in case plaintiff recovered judgment, held not to have offended against the rule forbidding reference to the matter of insurance in damage cases, especially in view of the facts that counsel did not request a ruling nor assign as error that the verdict was excessive. *Koppang v. Sevier*, 106 M 79, 90, 75 P 2d 790.

Recovery Against Independent Tortfeasor

Under this section the widow of a highway flagman who was struck by a passing automobile while in the discharge of his duties, was entitled to maintain an action against the driver of the car not subject to the provisions of the act, and the action was not barred by the fact that plaintiff had received compensation for the death of her decedent as provided therein. *Koppang v. Sevier*, 101 M 234, 245, 53 P 2d 455.

Recovering Twice for Same Injury

Claimant who was injured in 1930 after her right of action against the tortfeasor had been taken away by ch. 121, l. 1925, making her recovery under the act exclusive, and insurance company voluntarily discharged its obligation to claimant, held, against contention that she couldn't recover twice for same injury, that the act makes no allowance for pain and suffering, and the compensation under the act is but remotely connected with the damage suffered (being a wage obligation thrust upon the employer), payment received was no bar to taking under the act. *Chisholm v. Vocational School*, 103 M 503, 510, 64 P 2d 838.

Silence Presumes Election to be Bound

The silence of an employee, when given an opportunity to elect whether he will be bound or not bound by the provisions of the workmen's compensation law, establishes a presumption that he elects to become subject to it. *Shea v. North Butte Min. Co.*, 55 M 522, 536, 179 P 499.

"Subrogation"

The provision that the employer or insurance carrier paying the compensation shall be subrogated to one-half gross compensation paid to and received by claimant, means the sum actually paid and received, and not what is to be paid in weekly installments during a course of

years. Where a widow employed an attorney on a contingent fee of one-half the amount recovered, the right of subrogation of the industrial accident board applied only to the widow's one-half share, and not to the attorney's right to his share of the settlement. *Hardware Mutual Casualty Co. v. Butler*, 116 M 73, 80, 86, 148 P 2d 563.

Subrogation is the creature of equity and will not be permitted where it will work injustice to the rights of those having equal or superior equities, or where it will operate to defeat a legal right. The doctrine requires that the person seeking benefits must have paid a debt due to a third person in full, before he can be substituted to that person's rights; it is not a liability to pay but an actual payment to the creditor which raises the equitable right to subrogation; thus is the general rule. *Hardware Mutual Casualty Co. v. Butler*, 116 M 73, 82, 148 P 2d 563.

Where Workmen's Compensation Act Inapplicable

In action by employee against mining company to recover damages for personal injuries caused by negligent treatment of plaintiff's injured eye by the company's first-aid attendant resulting in loss of sight of the eye, the company's contention that plaintiff was barred from maintaining the action by the provisions of the workmen's compensation act, held, not sustainable, the injury flowing from the unskillful treatment of the eye, not having arisen out of and in the course of plaintiff's employment, but from the company's negligence in selecting a first-aid attendant. *Vesel v. Jardine Mining Co.*, 110 M 82, 99, 100 P 2d 75.

References

Miller v. Granite County Power Co. et al., 66 M 368, 373, 213 P 604; *Nicholson v. Roundup Coal Min. Co. et al.*, 79 M 358, 375, 257 P 270; *Clark v. Olson*, 96 M 417, 425, 31 P 2d 283; *Tarrant v. Helena Building & Realty Co.*, 116 M 319, 324, 156 P 2d 168.

Workmen's Compensation—2084 et seq., 2103 et seq., 2142 et seq.

71 C.J. Workmen's Compensation §§ 1488 et seq., 1506 et seq., 1533 et seq.

Claim against employer as tortfeasor as bar to claim against him as employer, or vice versa. 98 ALR 416.

Taking out insurance covering employees not within act as election to accept act. 103 ALR 1523.

Rights and remedies when employee is injured by negligence of third person. 106 ALR 1040.

Liability for injury by wilful misconduct of third person. 112 ALR 1268.

What amounts to election by employer as to whom act is not mandatory. 136 ALR 899.

What amounts to withdrawal of termination of election by employer to come within Workmen's Compensation Act. 145 ALR 921.

92-205. (2839.1) Defenses available. In any such action brought by an employee, all defenses that would be available to defendant but for the workmen's compensation act shall be available as defenses in such action.

History: En. Sec. 2, Ch. 138, L. 1933.

References

Clark v. Olson, 96 M 417, 433, 31 P 2d 283.

92-206. (2840) Compensation plan No. 3 exclusive, etc., when a public corporation is the employer—duty of governing body of corporations. Where a public corporation is the employer, or any contractor engaged in the performance of contract work for such public corporation, the terms, conditions, and provisions of compensation plan No. 3 shall be exclusive, compulsory, and obligatory upon both employer and employee. Any sums necessary to be paid under the provisions of this act by any public corporation shall be considered to be ordinary and necessary expense of such corporation, and the governing body of such public corporation shall make appropriation of and pay such sums, into the accident or administration fund, as the case may be, at the time and in the manner provided for in this act, notwithstanding that such governing body may have failed to anticipate such ordinary and necessary expense in any budget, estimate of expenses, appropriations, ordinances, or otherwise. Whenever any contractor engaged in the performance of contract work for any public corporation is the employer, such public corporation upon final settlement with the contractor shall deduct for the benefit of the industrial accident fund the amount of all premium assessments necessary to be paid by such contract under the provisions of this act. Whenever any public corporation neglects or refuses to file with the industrial accident board monthly payroll report of its employees, the board is hereby authorized and empowered to levy an arbitrary assessment upon such public corporation in an amount of twenty-five dollars for each such assessment, which assessments shall be collected in the manner provided in this act for the collection of assessments.

History: En. Sec. 3, Ch. 96, L. 1915; amd. Sec. 1, Ch. 100, L. 1919; amd. Sec. 1, Ch. 196, L. 1921; re-en. Sec. 2840, R. C. M. 1921.

Exclusive as to Cities

Compensation plan No. 3 is, as to a city, exclusive, compulsory, and obligatory upon both employer and employee. *City of Butte v. Industrial Accident Board*, 52 M 75, 77, 156 P 130.

As to a private employer, such as a contractor, and his truck driver, the workmen's compensation act is contractual in character and became binding on them at their election but not otherwise, but, as to the city and its employees, the act is exclusive, compulsory and obligatory. *Sullivan v. City of Butte*, 117 M 215, 218, 157 P 2d 479.

National Forest Service Not a Public Corporation

The national forest service is not a public corporation within the meaning of the workmen's compensation act and is not covered by this section, providing that where a public corporation is the employer, or any contractor doing contract work for such corporation, the provisions of compensation plan No. 3 shall be exclusive and compulsory upon employer and employee. *Loney v. Industrial Accident Board*, 87 M 191, 194, 286 P 408.

References

Cited or applied as section 3 (e), chapter 96, laws of 1915, before amendment, in *Lewis and Clark County v. Industrial Accident Board*, 52 M 6, 7, 155 P 268;

City of Butte v. Industrial Accident Board, 52 M 75, 77, 156 P 130; Clark v. Olson, 96 M 417, 424, 31 P 2d 283; Aleksich v. Industrial Accident Fund, 116 M 127, 131, 151 P 2d 1016.

Municipal corporation as employer with in Workmen's Compensation Act. 54 ALR 788.

Compensation for injury to employee of municipal corporation. 83 ALR 1018.

92-207. (2841) Employers engaged in hazardous industries—election.

Every employer engaged in the industries, works, occupations, or employments in this act specified as "hazardous", shall, on or before the first day of July, 1947, if such employer be then engaged in such hazardous industry, work, occupation, or employment, or, if such employer be not so engaged on said date, shall, before entering upon such hazardous work, occupation, or employment, elect or choose which of the plans mentioned in this act he or it will be bound by. Such election shall be in the form prescribed by the board, and shall state whether such employer shall be bound by compensation plan number one, or compensation plan number two, or compensation plan number three, and a notice of such election, with the nature thereof shall be posted in a conspicuous place in the place of business of such employer, and a copy of such notice, together with an affidavit of such posting shall be filed with the board.

Provided any employer engaged in the business of coal mining, or the employees of an employer so engaged, shall be compelled to be bound by one of the compensation plans provided by this act.

After having once elected or chosen to be bound by one of the plans provided in this act, such employer shall be bound by such election, except as hereinafter provided, for said first fiscal year and each succeeding fiscal year, provided, however, that such employer may at any time upon thirty (30) days' written notice to the insurer or the board, as the case may be, elect to be bound by a different compensation plan than one by which he is then governed, provided there is no gap in the coverage. Such election must be made in the manner provided for in reference to the first election of such employer under this act. If any employer engaged in the industry, work, occupation or employment in this act specified as hazardous shall fail to make said election, in the time and in the manner herein prescribed, he shall be guilty of a misdemeanor, and punishable by a fine of not less than one hundred dollars (\$100.00) nor more than six hundred dollars (\$600.00) or imprisonment in the county jail for a period not to exceed six (6) months or by both such fine and imprisonment. A failure to provide compensation for each employee shall be deemed a separate offense for the purposes of this act.

History: En. Sec. 3, Ch. 96, L. 1915; re-en. Sec. 2841, R. C. M. 1921; amd. Sec. 1, Ch. 119, L. 1939; amd. Sec. 1, Ch. 135, L. 1941; amd. Sec. 3, Ch. 235, L. 1947.

NOTE.—For cases citing workmen's compensation act (secs. 92-101 to 92-1222) as an entirety, see references under section 92-101.

References

Cited or applied as section 3 (f), chapter 96, laws of 1915, in City of Butte v.

Industrial Accident Board, 52 M 75, 76, 156 P 130; Shea v. North Butte Min. Co., 55 M 522, 530, 179 P 499; Bruce v. McAdoo, 65 M 275, 211 P 772; Aleksich v. Industrial Accident Fund, 116 M 127, 137, 151 P 2d 1016.

Workmen's Compensation 393 et seq. 71 C.J. Workmen's Compensation § 259 et seq.

Who are within provisions of act as to hazardous occupation. 83 ALR 1018.

92-208. (2842) Employee engaged in hazardous occupation bound by what plan—election. Every employee in the industries, works, occupations, or employments in this act specified as “hazardous,” shall become subject to and be bound by the provisions of that plan of compensation which shall have been adopted by his employer, unless such employee shall elect not to be bound by any of the compensation provisions of this act, and until such employee shall have made such election. Such election shall be made by written notice in the form prescribed by the board, served upon the employer, and a copy filed with the board, together with the proof of such service.

History: En. Sec. 3, Ch. 96, L. 1915; re-en. Sec. 2842, R. C. M. 1921.

NOTE.—For cases citing workmen's compensation act (secs. 92-101 to 92-1222) as an entirety, see references under section 92-101.

References

Cited or applied as section 3 (g), chapter 96, laws of 1915, in *City of Butte v. Industrial Accident Board*, 52 M 75, 80,

156 P 130; *Shea v. North Butte Min. Co.*, 55 M 522, 530, 179 P 499; *Tarrant v. Helena Building & Realty Co.*, 116 M 319, 324, 156 P 2d 168; *Aleksich v. Industrial Accident Fund*, 116 M 127, 131, 151 P 2d 1016.

Workmen's Compensation 399 et seq.
71 C.J. *Workmen's Compensation* § 264 et seq.

92-209. (2844) Employer shall make election before being bound—employee presumed to have elected. It is the intention of this act that any employer engaged in hazardous occupations as defined herein shall, before being bound by either of the compensation plans herein provided, elect to be so bound thereby, and that the employee shall be presumed to have elected to be subject to and bound by the provisions of the particular plan which may have been adopted by his employer, unless such employee shall affirmatively elect not to be bound by this act. Provided, that an employer, after having been bound by one or the other of the three plans, may be cancelled as an employer under the act, when such employer actually ceases operating and files a signed statement to that effect with the board. Upon such filing the board may return the deposit of said employer if all premiums are paid.

History: En. Sec. 3, Ch. 96, L. 1519; re-en. Sec. 2844, R. C. M. 1921; amd. Sec. 4, Ch. 235, L. 1947.

NOTE.—For cases citing workmen's compensation act (secs. 92-101 to 92-1222) as an entirety, see references under section 92-101.

Enrollment Under Act

Where after a corporation has enrolled under the workmen's compensation act, a successor takes over its business, it is the duty of the industrial accident board to determine whether the latter is proper-

ly enrolled, and if not, to see to it that notices displayed in its place of business that it is so enrolled are removed therefrom. *Miller v. Aetna Life Ins. Co.*, 101 M 212, 219, 53 P 2d 704.

References

Cited or applied as section 3 (i), chapter 96, laws of 1915, in *City of Butte v. Industrial Accident Board*, 52 M 75, 76, 156 P 130; *Shea v. North Butte Min. Co.*, 55 M 522, 530, 179 P 499; *Miller v. Granite County Power Co. et al.*, 66 M 368, 373, 213 P 604.

92-210. (2845) Election at any time. Any employee who has elected not to be bound by the provisions of this act in the manner herein provided may revoke such election and elect to come thereunder at any time. Any employer who has failed to elect to be bound by either one or the other of the compensation plans herein mentioned, may, at any time during any

fiscal year, elect to be bound thereby, which said election shall be made as hereinbefore provided; but whenever any employer or employee shall have elected to come under the provisions hereof, such election, when it shall have been made, shall bind such employer and employee for the rest of the then fiscal year.

History: En. Sec. 3, Ch. 96, L. 1915;
re-en. Sec. 2845, R. C. M. 1921.

NOTE.—For cases citing workmen's compensation act (secs. 92-101 to 92-1222) as an entirety, see references under section 92-101.

References

Cited or applied as section 3 (j), chapter 96, laws of 1915, in *Shea v. North Butte Min. Co.*, 55 M 522, 530, 179 P 499.

Workmen's Compensation 405.

71 C.J. Workmen's Compensation § 266.

92-211. (2846) Compensation when employer has not elected. No compensation shall be paid to any employee, whether such employee has elected to come under this act or not, where his employer has failed to elect, and has failed to come under one or the other of the compensation plans herein provided.

History: En. Sec. 3, Ch. 96, L. 1915;
re-en. Sec. 2846, R. C. M. 1921.

Workmen's Compensation 394, 406.

71 C.J. Workmen's Compensation §§ 259, 267.

CHAPTER 3

HAZARDOUS OCCUPATIONS TO WHICH ACT APPLIES

- Section 92-301. Act applies to all inherently hazardous occupations as enumerated.
92-302. Construction work.
92-303. Operation and repair work.
92-304. Factories using power-driven machinery.
92-305. Miscellaneous work.
92-306. Hazardous occupations not enumerated or hereafter arising.

92-301. (2847) Act applies to all inherently hazardous occupations as enumerated. This act is intended to apply to all inherently hazardous works and occupations within this state, and it is the intention to embrace all thereof in the four following sections, and the works and occupations enumerated in said sections are hereby declared to be hazardous, and any employer having any workmen engaged in any of the hazardous works or occupations herein listed shall be considered as an employer engaged in hazardous works and occupations as to all his employees.

History: En. Sec. 4, Ch. 96, L. 1915;
amd. Sec. 2, Ch. 100, L. 1919; re-en. Sec. 2847, R. C. M. 1921.

If Any Employees of Concern Covered by Act, All Are

Under this section, held, that where an employer has any of his workmen covered by the protection afforded by the workmen's compensation act, all his employees will be held to come within its provisions. *Williams v. Brownfield-Canty Co. et al.*, 95 M 364, 371, 26 P 2d 980.

Nonhazardous Occupations

Held, that the operation of an electric passenger elevator is not a hazardous em-

ployment within the provisions of the workmen's compensation act. Page v. *New York Realty Co.*, 59 M 305, 310 et seq., 196 P 871.

Held, that the duties of a member of the board of county commissioners incidental to the inspection and the making of repairs of highways are not of an inherently hazardous character, do not fall within any of those occupations enumerated in the workmen's compensation act and are not of the same general character as those mentioned therein, and that therefore compensation for the death of such an officer in an automobile accident on his return from a road inspection tour was properly disallowed. *Moore v. Indus-*

trial Accident Fund, 80 M 136, 138, 259 P 825.

Operation Without Limits of the State

The provisions of this section that the workmen's compensation act shall apply "to all inherently hazardous works and occupations within this state," held not necessarily to exclude its operation beyond the limits of the state where the employee meets with an accidental injury, while furthering his employer's business localized in Montana, after passing over the state line. *Loney v. Industrial Accident Board*, 87 M 191, 197, 286 P 408.

Policeman Not Included

Held, that the act applies to paid public officers only when their duties require the performance of occupations enumerated in the act as inherently hazardous, or, under section 92-306 by the doctrine of ejusdem generis, of occupations of the same kind as those enumerated. Since the occupation of policeman or that of peace officers is not by the act desig-

nated as inherently hazardous and no other occupations similar to theirs are therein enumerated as inherently hazardous, no cause for relief exists. *Aleksich v. Industrial Accident Fund*, 116 M 127, 140, 151 P 2d 1016.

Question of Law

The question as to what persons or accidents come within the provisions of the workmen's compensation act is one of law rather than one of fact. *Page v. New York Realty Co.*, 59 M 305, 310 et seq., 196 P 871.

References

Bruce v. McAdoo, 65 M 275, 289, 211 P 772; *Miller v. Granite County Power Co. et al.*, 66 M 368, 373, 213 P 604; *Tarrant v. Helena Building & Realty Co.*, 116 M 319, 322, 156 P 2d 168.

Workmen's Compensation 101 et seq.
71 C.J. Workmen's Compensation § 74 et seq.

92-302. (2848) Construction work. Tunnels, bridges, trestles; subaqueous works, ditches, and canals (other than irrigation without blasting), dock excavations, fire-escapes, sewers, house moving, house wrecking, iron or steel frame structures or parts of structures, electric light, or power plants, or systems, telegraph or telephone systems; pile-driving, steam railroads, steeples, towers, or grain elevators, not metal framed; drydocks, without excavation; jetties, breakwaters, chimneys, marine railways, waterworks, or water systems; electric railways, cable railways, street railways, with or without rock work or blasting; erecting fire-proof doors or shutters; steamheating plants; blasting; tanks, water-towers, or windmills, not metal framed; shaft sinking; concrete buildings; freight or passenger elevators; fireproofing of buildings; galvanized iron or tin work; gas-works or systems; marble, stone, or brick work; road-making, with or without blasting; roof work; safe moving; slate work; plumbing work, inside or outside; metal smoke-stacks or chimneys; excavations not otherwise specified; blast-furnaces; street or other grading; advertising signs; ornamental work on buildings; ship or boat-building or rigging, with or without scaffolding; carpenter work not otherwise specified; installation of steam-boilers or engines; placing wires in conduits; installing dynamos; putting up belts for machinery; marble, mantel, stone, or tile setting; metal-ceiling work; mill or ship-wrighting; painting of building or structures; installation of automatic sprinklers; concrete laying in floors, foundations, or street paving; asphalt laying; covering steam-pipes or boilers; installation of machinery not otherwise specified; drilling wells; installing electrical apparatus or fire-alarm apparatus in buildings; house-heating or ventilating systems; glass setting; building hothouses; lathing, paper-hanging, plastering, wooden stair building.

History: En. Sec. 4, Ch. 96, L. 1915; re-en. Sec. 2848, R. C. M. 1921.

References

Tarrant v. Helena Building & Realty

Co., 116 M 319, 322, 156 P 2d 168; Aleksich v. Industrial Accident Fund, 116 M 127, 130, 151 P 2d 1016.

Workmen's Compensation 122 et seq. 71 C.J. Workmen's Compensation § 81 et seq.

92-303. (2849) Operation and repair work. (Including repair work) of logging, cable, electric, street, steam or other railroads; dredges; interurban electric railroads using third rail systems; electric light and power plants; quarries; telegraph systems; stone crushers; blast furnaces; smelters; coal mines; gas works; steam boats; tugs and ferries; mines other than coal; steam-heating or power plants; grain elevators; freight elevators and passenger elevators; laundries; water-works; paper-mills; pulp-mills; garbage and fertilizer works.

History: En. Sec. 4, Ch. 96, L. 1915; re-en. Sec. 2849, R. C. M. 1921; amd. Sec. 1, Ch. 117, L. 1925.

as an entirety, see references under section 92-101.

NOTE.—For cases citing workmen's compensation act (secs. 92-101 to 92-1222)

References

Bruce v. McAdoo, 65 M 275, 289, 211 P 772; Aleksich v. Industrial Accident Fund, 116 M 127, 130, 151 P 2d 1016.

92-304. (2850) Factories using power-driven machinery. Stamping tin metal; bridge work; railroad, car, or locomotive making or repairing; cooperage; logging, with or without machinery; sawmills, shingle-mills, staves, veneer, box, lath, packing-cases, sash, doors, blinds, barrel, keg, pail, basket, tub, woodenware or wooden fibre ware, rolling-mills; making steam shovels or dredges; tanks, water-towers, asphalt; building material not otherwise specified; fertilizer; cement, stone, with or without machinery; kindling-wood, masts or spars, with or without machinery; canneries, metal stamping; creosoting works; excelsior; iron; steel; copper, zinc, brass, or lead articles or wares not otherwise specified; working in wood not otherwise specified; hardware, tile, brick, terra-cotta, fire-clay, pottery, earthenware, porcelain ware; peat fuel, briquettes; breweries; bottling works; boiler works; foundries; machine-shops not otherwise specified; cordage; working in food-stuffs; including oils, fruits, and vegetables; working in wool, cloth, leather, paper, broom, brush, rubber, or textiles not otherwise specified; making jewelry; making soap, tallow, lard, grease, condensed milk; creameries; printing, electrotyping, photo-engraving, engraving, and lithographing; sugar factories.

History: En. Sec. 4, Ch. 96, L. 1915; re-en. Sec. 2850, R. C. M. 1921.

Workmen's Compensation 118 et seq. 71 C.J. Workmen's Compensation § 95 et seq.

References

Aleksich v. Industrial Accident Fund, 116 M 127, 130, 151 P 2d 1016.

92-305. (2851) Miscellaneous work. Operating stock-yards, with or without railroad entry; packing houses; wharf operations; artificial ice and refrigerating or cold-storage plants; tanneries; electric systems not otherwise specified; theatre stage employees, including moving-picture machine operators; fireworks manufacturing, powder works; city and town firemen, highway patrolmen, police officers and all peace officers; also all public officers and their deputies, assistants and employees.

History: En. Sec. 4, Ch. 96, L. 1915; re-en. Sec. 2851, R. C. M. 1921; amd. Sec. 1, Ch. 88, L. 1945.

References

Aleksich v. Industrial Accident Fund, 116 M 127, 131, 151 P 2d 1016.

92-306. (2852) Hazardous occupations not enumerated or hereafter arising. If there be or arise any hazardous occupation or work other than hereinbefore enumerated, it shall come under this act and its terms, conditions, and provisions as fully and completely as if hereinbefore enumerated. The enumeration of certain works and occupations as hazardous shall not exclude from the provisions of this act any other occupation actually hazardous, whether enumerated or not. All other works and occupations hazardous in their nature shall be included within the terms of this act. No employment or occupation shall be excluded from the benefits of this act as a hazardous occupation because it is not of the same class as other occupations described as hazardous in this statute.

History: En. Sec. 5, Ch. 96, L. 1915; re-en. Sec. 2852, R. C. M. 1921; amd. Sec. 2, Ch. 88, L. 1945.

Operation and Effect

This section declaring that if there be or arise any hazardous occupation not enumerated in the workmen's compensation act, it shall nevertheless come within its provisions, has reference only to such employments as are of the same general character as those enumerated therein, under the rule of ejusdem generis. *Moore v. Industrial Accident Fund*, 80 M 136, 138, 259 P 825.

Held, that the act applies to paid public officers only when their duties require the performance of occupations enumer-

ated in the act as inherently hazardous, or, under this section by the doctrine of ejusdem generis, of occupations of the same kind as those enumerated. Since the occupation of policeman or that of peace officers is not by the act designated as inherently hazardous and no other occupations similar to theirs are therein enumerated as inherently hazardous, no cause for relief exists. *Aleksich v. Industrial Accident Fund*, 116 M 127, 140, 151 P 2d 1016.

Workmen's Compensation 114 et seq.
71 C.J. *Workmen's Compensation* § 76 et seq.

Who are within provisions of act as to hazardous occupation. 83 ALR 1018.

CHAPTER 4

MEANING OF WORDS EMPLOYED IN ACT

Section	92-401.	Meaning of words employed in act.
	92-402.	Factories defined.
	92-403.	Workshop defined.
	92-404.	Mill defined.
	92-405.	Mine defined.
	92-406.	Quarry defined.
	92-407.	Engineering defined.
	92-408.	Reasonably safe place to work defined.
	92-409.	Reasonably safe tools and appliances defined.
	92-410.	Employer defined.
	92-411.	Employee and workman defined.
	92-412.	Injury to include death.
	92-413.	Beneficiary defined.
	92-414.	Major dependent defined.
	92-415.	Minor dependent defined.
	92-416.	Invalid defined.
	92-417.	Child defined, to include whom.
	92-418.	Injury or injured defined.
	92-419.	The singular and plural include both.
	92-420.	Masculine includes all genders.
	92-421.	Physician to include surgeon.
	92-422.	Week defined.
	92-423.	Wages defined.
	92-424.	Wife or widow defined.
	92-425.	Husband or widower defined.
	92-426.	Board defined.
	92-427.	Commissioner defined.
	92-428.	Appointed member of the board defined.

streets, highways, sewers, street railways, railroads, logging roads, inter-urban roads, harbors, docks, canals; electric, steam, or water-power plants; telegraph and telephone plants and lines; electric light and power lines, and includes any other work for the construction, alteration, or repair of which machinery driven by mechanical power is used.

History: En. Sec. 6, Ch. 96, L. 1915; Workmen's Compensation 122.
re-en. Sec. 2859, R. C. M. 1921. 71 C.J. Workmen's Compensation § 81.

92-408. (2860) Reasonably safe place to work defined. "Reasonably safe place to work" means that the place of employment has been made as free from danger to the life or safety of the employee as the nature of the employment will reasonably permit.

History: En. Sec. 6, Ch. 96, L. 1915; as an entirety, see references under section 92-101.
re-en. Sec. 2860, R. C. M. 1921.

NOTE.—For cases citing workmen's compensation act (secs. 92-101 to 92-1222)

References

Nicholson v. Roundup Coal Min. Co. et al., 79 M 358, 375, 257 P 270.

92-409. (2861) Reasonably safe tools and appliances defined. "Reasonably safe tools and appliances" are such tools and appliances as are adapted to, and are reasonably safe for use for the particular purpose for which they are furnished, and shall embrace all safety devices and safeguards provided or prescribed by the "safety provisions" of the act for the purpose of mitigating or preventing a specific danger.

History: En. Sec. 6, Ch. 96, L. 1915;
re-en. Sec. 2861, R. C. M. 1921.

92-410. (2862) Employer defined. "Employer" means the state and each county, city and county, city school district, irrigation district, all other districts established by law and all public corporations and quasi-public corporations and public agencies therein and every person, firm, voluntary associations and private corporation, including any public service corporation and including an independent contractor, who has any person in service, in hazardous employment, under any appointment or contract of hire, expressed or implied, oral or written, and the legal representative of any deceased employer or the receiver or trustee thereof.

History: En. Sec. 6, Ch. 96, L. 1915;
re-en. Sec. 2862, R. C. M. 1921; amd. Sec. 2, Ch. 121, L. 1925.

NOTE.—For cases citing workmen's compensation act (secs. 92-101 to 92-1222) as an entirety, see references under section 92-101.

Independent Contractor

An "independent contractor" generally speaking, is one employed to perform work on condition that he is free from the control of the employer as respects the manner in which the details thereof are to be executed. *Nelson v. Stukey*, 89 M 277, 292, 300 P 287.

References

Cited or applied as section 6 (i), chap-

ter 96, laws of 1915, in *Lewis and Clark County v. Industrial Accident Board*, 52 M 6, 7, 155 P 268; *City of Butte v. Industrial Accident Board*, 52 M 75, 76, 156 P 130; *Miller v. Aetna Life Ins. Co.*, 101 M 212, 217, 53 P 2d 704; *Aleksich v. Industrial Accident Fund*, 116 M 127, 131, 151 P 2d 1016; *Tarrant v. Helena Building & Realty Co.*, 116 M 319, 325, 156 P 2d 168.

Workmen's Compensation 186 et seq., 195 et seq.

71 C.J. Workmen's Compensation §§ 121 et seq., 127 et seq.

Meaning of "employer." 58 ALR 876 and 105 ALR 583.

92-411. (2863) Employee and workman defined. "Employee" and "workman" are used synonymously and mean every person in this state, including a contractor other than an "independent contractor" who is in the service of an employer as defined by the preceding section, under any appointment or contract of hire, expressed or implied, oral or written, including aliens and also including minors, whether lawfully or unlawfully employed, and all of the elected and appointed paid public officers and officers and members of boards of directors of quasi-public or private corporations while rendering actual service for such corporations for pay, including city and town firemen, highway patrolmen, police officers, county sheriffs, deputy sheriffs, constables, truant officers and all peace officers, also all public officers and their deputies, assistants and employees, but excluding any person whose employment is both casual and not in the courses of the trade, business, profession or occupation of his employer, unless such employer has elected to be bound by the provisions of the compensation law, in which case all employees are included, whether their employment is casual or otherwise, and also excluding any employee engaged in household or domestic service.

History: En. Sec. 6, Ch. 96, L. 1915; re-en. Sec. 2363, R. C. M. 1921; amd. Sec. 3, Ch. 121, L. 1925; amd. Sec. 1, Ch. 139, L. 1931; amd. Sec. 3, Ch. 88, L. 1945.

Employment How Terminated

Plaintiff having predicated his cause of action upon the relation of master and servant, his contention that his detention in the mine after eight hours had expired constituted false imprisonment as well as a violation of the eight-hour law thus terminating his employment, is without merit, since his employment could not be terminated in any such manner. *Wirta v. North Butte Mining Co. et al.*, 64 M 279, 285, 210 P 332.

Independent Contractor

An "independent contractor" (excluded from the benefits of the workmen's compensation act by this section), generally speaking, is one employed to perform work on condition that he is free from the control of the employer as respects the manner in which the details thereof are to be executed. *Nelson v. Stukey*, 89 M 277, 292, 300 P 287.

Minors—Capacity To Contract And Lawfulness Of Employment Immaterial Under Amendment

This section defining the term "employee" to include minors unlawfully employed, dispenses with the necessity of a valid contract of employment, making wholly immaterial the age or competency of the minor and the capacity of the minor to contract, as well as the lawfulness of the employment, rendering employers insured under the act immunity from common-law or statutory suits for

damages, even where injury or death results under employment in violation of section 10-201, the child labor law. *Tarrant v. Helena Building & Realty Co.*, 116 M 319, 323, 156 P 2d 168.

Minors "Unlawfully Employed" Under Child Labor Law, Included

Where a 13-year old girl, unlawfully employed under section 10-201 as operator of a passenger elevator was killed in the performance of her duties, and had failed to serve upon the employer a written notice of her election not to be bound by workmen's compensation act under sections 92-203 and 92-204, she being an "employee" under this section expressly including minors "whether lawfully or unlawfully employed," held, that her insured employer was immune from common-law or statutory suits for damages brought by her mother as administratrix. *Tarrant v. Helena Building & Realty Co.*, 116 M 319, 322, 156 P 2d 168.

Public Officer

By this section, bringing elected and appointed paid public officers within the protection of the workmen's compensation act, only such officers are brought under its provisions as are connected with or engaged in hazardous occupations of the same general character as those mentioned therein. *Moore v. Industrial Accident Fund*, 80 M 136, 137, 259 P 825; *Aleksich v. Industrial Accident Fund*, 116 M 127, 133, 151 P 2d 1016.

When Employment Not "Casual"

Employment is not "casual," within the meaning of the workmen's compensation act, in the sense that injuries sustained

during the course of such employment are not compensable, if the employment was in the usual course of trade or business of the employer. *Industrial Acc. Board v. Brown Bros. L. Co.*, 88 M 375, 380, 292 P 902.

Operation and Effect

Plaintiff, who was employed by contractor employed by city and who had entered no contract of hire with city, was not on city's payroll, was not an employee of the city within the meaning of this section. *Sullivan v. City of Butte*, 117 M 215, 218, 157 P 2d 479.

92-412. (2864) **Injury to include death.** "Injury" means and shall include death resulting from injury.

History: En. Sec. 6, Ch. 96, L. 1915; re-en. Sec. 2864, R. C. M. 1921.

References

Nicholson v. Roundup Coal Min. Co. et al., 79 M 358, 374, 257 P 270.

92-413. (2865) **Beneficiary defined.** "Beneficiary" means and shall include a surviving wife or husband and a surviving child or children under the age of eighteen years and an invalid child or invalid children over the age of eighteen years, or if no surviving wife or husband then a surviving child or children under the age of eighteen years and an invalid child or invalid children over the age of eighteen years; provided, however, that no invalid child over the age of eighteen years shall be considered a beneficiary unless dependent upon the decedent for support at the time of injury.

History: En. Sec. 6, Ch. 96, L. 1915; re-en. Sec. 2865, R. C. M. 1921; amd. Sec. 4, Ch. 121, L. 1925.

Operation and Effect

A surviving husband incapable of supporting himself, and living with or legally entitled to be supported by the deceased wife at the time of the injury sustained by the latter in an employment covered by the workmen's compensation act and from which injury she died, is a beneficiary under the provisions of the act. *Kearney v. Industrial Acc. Board*, 90 M 228, 233, 1 P 2d 69.

92-414. (2866) **Major dependent defined.** "Major dependent" means if there be no beneficiary as defined in the preceding section, the father or mother, or the survivor of them, if actually dependent upon the decedent at the time of his injury, then to the extent of such dependency, not to exceed, however, the maximum compensation provided for in this act.

History: En. Sec. 6, Ch. 96, L. 1915; re-en. Sec. 2866, R. C. M. 1921; amd. Sec. 5, Ch. 121, L. 1925; amd. Sec. 1, Ch. 58, L. 1935.

Compensation How Determined

Whether a claimant for compensation

References

Bruce v. McAdoo, 65 M 275, 289, 211 P 772; *Black v. Northern Pac. Ry. Co.*, 66 M 538, 547 et seq., 214 P 82; *Industrial Acc. Board v. Brown Bros. Lumber Co.*, 88 M 375, 380, 292 P 902; *Clark v. Olson*, 96 M 417, 425, 31 P 2d 283.

Workmen's Compensation Ⓒ231.

71 C.J. *Workmen's Compensation* § 159.

"Workmen" within the act. 129 ALR 990.

Workmen's Compensation Ⓒ512.

71 C.J. *Workmen's Compensation* § 327 et seq.

References

Cited or applied as section 6 (1), chapter 96, laws of 1915, in *Morgan v. Butte Central Min. etc. Co.*, 58 M 633, 639, 194 P 496; *Goodwin v. Elm Orlu Min. Co. et al.*, 83 M 122, 155, 269 P 403; *Betor v. National Biscuit Co.*, 85 M 481, 484, 280 P 641; *Cogdill v. Aetna Life Ins. Co. et al.*, 90 M 244, 2 P 2d 292; *Hendy v. Industrial Accident Board*, 115 M 516, 520, 146 P 2d 324.

Workmen's Compensation Ⓒ412 et seq.

71 C.J. *Workmen's Compensation* § 271 et seq.

is dependent upon the earnings of an injured employee and the extent of the dependency are questions determinable as of the date of the accident to the latter, and the dependent's rights are fixed as of that date under the conditions then shown to exist. *Edwards v. Butte & Superior*

Mining Co., 83 M 122, 125 et seq., 270 P 634.

Id. Held, that the mother of a workman whose injuries received in the course of his employment resulted in his death was wholly dependent upon his earnings at the time of the accident, where it appeared that the monthly living expenses of claimant, a widow with two minor children attending school, were \$100, that her only income aside from his earnings consisted of a pension of \$16 per month and a sum of money intermittently earned by one of the children in selling papers occasionally, amounting to \$7 a week, and that the state of her health made it impossible for her to secure employment; held, further, that she, as a major dependent, was entitled to compensation at the maximum rate.

Dependency Question of Fact

The question of a claimant's dependency upon the earnings of an injured employee is one of fact and where resolved by the industrial accident board in favor of the claimant, its finding, if based on substantial evidence, will not be disturbed on appeal. *Edwards v. Butte & Superior Mining Co.*, 83 M 122, 125 et seq., 270 P 634.

To avail one's self of the benefit of the workmen's compensation act, actual dependency of the claimant upon the decedent is an indispensable requisite; the dependency which must exist does not include the maintenance of others whom the dependent is under no legal obligation to maintain or contributions which merely enable the donee to accumulate money; and one may not be said to be a dependent who has sufficient means at hand for supplying present necessities, judging those according to the class and position in life of the alleged dependent. *Betor v. National Biscuit Co.*, 85 M 481, 485, 280 P 641.

"Dependent"

A "dependent" within the meaning of the workmen's compensation act, is one who looked to the workman for support in some measure or extent; dependency does not depend on whether the claiming dependent could support himself without decedent's earnings or so reduce his expenses that he could do without such assistance, but whether he was in fact supported in whole or in part by the earnings of decedent under circumstances indicating an intent on the part of decedent to furnish such support, the need of claimant being more important than the extent of contributions theretofore made. *Ross v. Industrial Accident Board*, 106 M 486, 497, 80 P 2d 362.

Extent of Compensation

Under the workmen's compensation act, a major dependent (father or mother) is entitled to compensation for injuries to a son resulting in death, only to the extent of his or her actual dependency upon the earnings of decedent. *Edwards v. Butte & Superior Mining Co.*, 83 M 122, 125 et seq., 270 P 634.

Quaere

Does the provision of this section defining "major dependent" as "the father and mother, or the survivor of them, if actually dependent upon the deceased" etc., contemplate that both, and not one only, shall constitute the "major dependent," or may the wife, the husband still living, claim as such dependent? *Betor v. National Biscuit Co.*, 85 M 481, 485, 280 P 641.

Stepfather Held Not "Father"

The stepfather of a workman who died from injuries received in an industrial accident, held not a "father" within the meaning of this section. The fact that the legislature in sec. 92-417 defines the word "child" as including "stepchild," but failed to bring "stepfather" or "stepmother" within the definition of "father" or "mother," excludes the assumption that it intended to include them in the definition. *Hendy v. Industrial Accident Board*, 115 M 516, 518, 520, 146 P 2d 324.

Id. "Stepfather" is defined as a word in general use, which as generally understood means the husband of one's mother by a subsequent marriage; the husband of one's mother who is not one's father. The essential difference between a father and a stepfather has been expressly recognized by this court in *State ex rel. Sheedy v. District Court*, 66 M 427, 213 P 802, 804, as follows: "The word 'parent' means 'one who generates a child, a father or mother' (standard dictionary); 'the lawful father or mother by blood and not a stepfather or stepmother or one standing in loco parentis.'"

References

Cited or applied as section 6 (m), chapter 96, laws of 1915, in *Morgan v. Butte Central Min. etc. Co.*, 58 M 633, 639, 194 P 496; *Goodwin v. Elm Orlu Min. Co. et al.*, 83 M 152, 155, 269 P 403.

"Dependency" within Workmen's Compensation Acts. 100 ALR 1090.

92-415. (2867) Minor dependent defined. "Minor dependent" means if there be no beneficiary or major dependent as defined in the preceding sections the brothers and sisters under the age of eighteen years, provided, however, that no invalid brother or invalid sister over the age of eighteen years shall be a "minor dependent" unless actually dependent upon the decedent at the time of his injury. Minor dependents shall be awarded compensations to the extent of such dependency, not to exceed, however, the maximum compensation provided for in this act.

History: En. Sec. 6, Ch. 96, L. 1915; re-en. Sec. 2867, R. C. M. 1921; amd. Sec. 6, Ch. 121, L. 1925.

NOTE.—For cases citing workmen's compensation act (secs. 92-101 to 92-1222) as an entirety, see references under section 92-101.

References

Cited or applied as section 6 (n), chap-

92-416. (2868) Invalid defined. "Invalid" means one who is physically or mentally incapacitated.

History: En. Sec. 6, Ch. 96, L. 1915; re-en. Sec. 2868, R. C. M. 1921.

References

Cited or applied as section 6 (o), chap-

92-417. (2869) Child defined, to include whom. "Child" shall include a posthumous child, a stepchild, a child legally adopted prior to the injury, an illegitimate child legitimized prior to the injury.

History: En. Sec. 6, Ch. 96, L. 1915; re-en. Sec. 2869, R. C. M. 1921.

References

Hendy v. Industrial Accident Board, 115 M 516, 520, 146 P 2d 324.

ter 96, laws of 1915, in Morgan v. Butte Central Min. etc. Co., 58 M 633, 639, 194 P 496; Hendy v. Industrial Accident Board, 115 M 516, 520, 146 P 2d 324.

Workmen's Compensation § 449 et seq.
71 C.J. Workmen's Compensation § 290 et seq.

ter 96, laws of 1915, in Morgan v. Butte Central Min. etc. Co., 58 M 633, 639, 194 P 496.

"Dependency" within act. 100 ALR 1090.

Children of one with whom deceased was living in illicit relations as dependent within act. 154 ALR 698.

92-418. (2870) Injury or injured defined. "Injury" or "injured" refers only to an injury resulting from some fortuitous event, as distinguished from the contraction of disease.

History: En. Sec. 6, Ch. 96, L. 1915; re-en. Sec. 2870, R. C. M. 1921.

NOTE.—See annotations under sec. 92-614 also.

Disease Aggravated or Accelerated by Accident

Held, that the death of a coal miner who was predisposed to heart disease, from shock while coming from work in the mine in which the temperature was very high and passing through an air course into which ice-cold air was being forced by means of a fan, rendering the temperature therein very low, was due to an "industrial" accident arising out of and in the course of his employment. *Nicholson v. Roundup Coal Min. Co.* et al., 79 M 358, 374, 257 P 270.

Id. Though death or injury resulting from disease and not proximately caused by an accident arising out of and in the course of an employment is not compensable under the workmen's compensation act, the fact that the employee at the time was suffering from disease does not preclude compensation if the disease was aggravated or accelerated by the accidental injury.

A workman is entitled to compensation under the workmen's compensation act when a previously existing latent condition or disease, not disabling, is aggravated or accelerated by some fortuitous event occurring in the course of his employment, which produces disability. *Murphy v. Industrial Accident Board*, 93 M 1, 10, 16 P 2d 705.

Heat Prostration—Death Compensable Although Heart Disease also Present

Death of workman caused by extreme heat from cement kilns which he was attending prior to his collapse held compensable under workmen's compensation act, and fact that decedent was suffering from heart disease previous to and on the day of his death, did not prevent recovery by his widow. *Birdwell v. Three Forks Portland Cement Co.*, 98 M 483, 498, 40 P 2d 43.

Id. Burden is on claimant to prove by a preponderance of the evidence that workman died as the result of an accidental injury, but it was not incumbent upon widow to have an autopsy performed to establish the cause of death.

Heat Stroke Constitutes Accidental Injury

Death of state highway employee caused

by heat prostration while working on oil-surfaced highway on mid-July afternoon held compensable under workmen's compensation act, and fact he lived eleven days after injury did not affect widow's right to recover compensation. *Ryan v. Industrial Accident Board*, 100 M 143, 151, 45 P 2d 775.

Neurosis Compensable

A disabling neurosis which has been caused by an accidental injury is compensable under the workmen's compensation act. *Sykes v. Republic Coal Co.*, 94 M 239, 245, 21 P 2d 732; *Best v. London Guarantee & Acc. Co.*, 100 M 332, 344, 47 P 2d 456; *O'Neil v. Industrial Accident Board*, 107 M 176, 182, 81 P 2d 688.

Workmen's Compensation \S 512 et seq.
71 C.J. Workmen's Compensation \S 327 et seq.

92-419. (2871) **The singular and plural include both.** Wherever the singular is used the plural shall be included, and wherever the plural is used the singular shall be included.

History: En. Sec. 6, Ch. 96, L. 1915;
re-en. Sec. 2871, R. C. M. 1921.

Statutes \S 188.
59 C.J. Statutes \S 577.

92-420. (2872) **Masculine includes all genders.** Wherever the masculine gender is used, the feminine and neuter shall be included.

History: En. Sec. 6, Ch. 96, L. 1915;
re-en. Sec. 2872, R. C. M. 1921.

92-421. (2873) **Physician to include surgeon.** The term "physician" shall include "surgeon," and in either case shall mean one authorized by law to practice his profession in this state.

History: En. Sec. 6, Ch. 96, L. 1915;
re-en. Sec. 2873, R. C. M. 1921.

Statutes \S 199.
59 C.J. Statutes \S 587.

92-422. (2874) **Week defined.** "Week" means six working days, but includes Sundays.

History: En. Sec. 6, Ch. 96, L. 1915;
re-en. Sec. 2874, R. C. M. 1921.

Must Be Construed With Other Sections

Held, that in awarding compensation, under sec. 92-701, this and the following section must be construed with it, hence an injured miner, working under the five-day week rule at \$5.25 per day, was cor-

rectly awarded \$21 for 26 weeks for total temporary disability, on the basis of a six-day week, the maximum prescribed by sec. 92-701 supra. *House v. Anaconda Copper Mining Co.*, 113 M 406, 409, 126 P 2d 814.

Time \S 6.
62 C.J. Time \S 22.

92-423. (2875) **Wages defined.** "Wages" mean the average daily wages received by the employee at the time of the injury for the usual hours of employment in a day, and overtime is not to be considered.

History: En. Sec. 6, Ch. 96, L. 1915;
re-en. Sec. 2875, R. C. M. 1921.

Workmen's Compensation \S 815 et seq.
71 C.J. Workmen's Compensation \S 520 et seq.

References

House v. Anaconda Copper Mining Co., 113 M 406, 409, 126 P 2d 814.

92-424. (2876) Wife or widow defined. "Wife" or "widow" means only a wife or widow living with, or legally entitled to be supported by the deceased at the time of the injury.

History: En. Sec. 6, Ch. 96, L. 1915; re-en. Sec. 2876, R. C. M. 1921.

NOTE.—For cases citing workmen's compensation act (secs. 92-101 to 92-1222) as an entirety, see references under section 92-101.

Operation and Effect

Under this section, compensation for injury to the husband may be awarded to a wife or widow only if at the time of the injury she was legally entitled to his support, i.e., if at that time she could have compelled him, under the laws of

the state, to support her. *Goodwin v. Elm Orlu Min. Co. et al.*, 83 M 152, 156 et seq., 269 P 403.

Workmen's Compensation \Rightarrow 431 et seq.
71 C.J. Workmen's Compensation § 281 et seq.

Bigamous marriage, effect of. 80 ALR 1428.

Woman marrying injured workman as entitled to rights of widow. 98 ALR 993.

"Dependency" within the act. 100 ALR 1090.

92-425. (2877) Husband or widower defined. "Husband" or "widower" means only a husband or widower incapable of supporting himself, and living with, or legally entitled to be supported by the deceased at the time of her injury.

History: En. Sec. 6, Ch. 96, L. 1915; re-en. Sec. 2877, R. C. M. 1921.

NOTE.—For cases citing workmen's compensation act (secs. 92-101 to 92-1222) as an entirety, see references under section 92-101.

Operation and Effect

A surviving husband incapable of supporting himself, and living with or legally entitled to be supported by the deceased wife at the time of the injury sustained by the latter in an employment covered by the workmen's compensation act and from which injury she died, is a beneficiary under the provisions of this section. *Kearney v. Industrial Acc. Board*, 90 M 228, 233, 1 P 2d 69.

The right of a husband to compensation on the ground that he was incapable of supporting himself is a question of fact, and where his wife was injured and died, while engaged in employment covered by the act, and where the husband worked steadily during the period in question, losing only an occasional week, the evidence presented in the case at bar held to support the finding of the trial court and industrial accident board, that he was not incapable of supporting himself at that time, and therefore not entitled to compensation. *Kyyny v. Sherman & Reed*, 111 M 593, 595, 113 P 2d 337.

92-426. (2878) Board defined. "Board" means the industrial accident board of the state of Montana.

History: En. Sec. 6, Ch. 96, L. 1915; re-en. Sec. 2878, R. C. M. 1921.

Workmen's Compensation \Rightarrow 1076 et seq.
71 C.J. Workmen's Compensation § 653 et seq.

92-427. (2879) Commissioner defined. "Commissioner" means one of the members of the industrial accident board.

History: En. Sec. 6, Ch. 96, L. 1915; re-en. Sec. 2879, R. C. M. 1921.

Workmen's Compensation \Rightarrow 1081.
71 C.J. Workmen's Compensation § 657 et seq.

92-428. (2880) Appointed member of the board defined. "Appointed member of the board" means that member of the industrial accident board appointed by the governor.

History: En. Sec. 6, Ch. 96, L. 1915; re-en. Sec. 2880, R. C. M. 1921.

92-429. (2881) Order defined. "Order" shall mean and include any decision, rule, regulation, direction, requirement, or standard of the board,

or any other determination arrived at or decision made by such board, excepting general or local orders as herein specified.

History: En. Sec. 6, Ch. 96, L. 1915; Workmen's Compensation 1092 et seq.
re-en. Sec. 2881, R. C. M. 1921. 71 C.J. Workmen's Compensation § 669 et seq.

92-430. (2882) General order defined. "General order" shall mean and include such order made under the safety provisions of this act as applies generally throughout the state to all persons, employments, or places of employment, or employees working in such places of employment classed as hazardous in this act.

History: En. Sec. 6, Ch. 96, L. 1915;
re-en. Sec. 2882, R. C. M. 1921.

92-431. (2883) Local order defined. "Local order" shall mean and include any ordinance, order, rule, or determination of any public corporation, or any order or direction of any other public official, board, or department upon any matter over which the industrial accident board has jurisdiction.

History: En. Sec. 6, Ch. 96, L. 1915;
re-en. Sec. 2883, R. C. M. 1921.

92-432. (2884) Pay-roll defined—estimate to establish pay-roll. "Pay-roll," "annual pay-roll" or "annual pay-roll for the preceding year," means the average annual pay-roll of the employer for the preceding calendar year, or, if the employer shall not have operated a sufficient or any length of time during such calendar year, twelve times the average monthly pay-roll for the current year; provided, that an estimate may be made by the board for any employer starting in business where no average pay-rolls are available, such estimate to be adjusted by additional payment by the employer or refund by the board, as the case may actually be on December 31st of such current year.

History: En. Sec. 6, Ch. 96, L. 1915; Workmen's Compensation 801 et seq.
re-en. Sec. 2884, R. C. M. 1921. 71 C.J. Workmen's Compensation § 517 et seq.

92-433. (2885) Year defined. "Year," unless otherwise specified, means calendar year. "Fiscal year" means the period of time between the first day of July and the thirtieth day of the succeeding June.

History: En. Sec. 6, Ch. 96, L. 1915; Time 4.
re-en. Sec. 2885, R. C. M. 1921. 62 C.J. Time § 13.

92-434. (2886) Public corporation defined. "Public corporation" means the state, or any county, municipal corporation, school district, city, city under commission form of government or special charter, town, or village.

History: En. Sec. 6, Ch. 96, L. 1915; as an entirety, see references under section 92-101.
re-en. Sec. 2886, R. C. M. 1921.

NOTE.—For cases citing workmen's compensation act (secs. 92-101 to 92-1222)

References

Loney v. Industrial Accident Board, 87 M 191, 194, 286 P 408.

92-435. (2887) Insurer defined. "Insurer" means any insurance company authorized to transact business in this state insuring any employer under this act.

History: En. Sec. 6, Ch. 96, L. 1915; Workmen's Compensation 1045 et seq.
re-en. Sec. 2887, R. C. M. 1921. 71 C.J. Workmen's Compensation § 627.

92-436. (2888) Casual employment defined. "Casual employment" means employment not in the usual course of trade, business, profession, or occupation of the employer.

History: En. Sec. 6, Ch. 96, L. 1915; re-en. Sec. 2888, R. C. M. 1921.

Operation and Effect

Defendant company's business was that of generating and disposing of electric power. A watchman at its plant employed a miner to dig a well to secure water for use at the watchman's dwelling-house, and was killed while doing so. The company had elected not to come under the workmen's compensation act. Held, that the employment of decedent was not in the usual course of business of the company but was casual in its nature. *Miller v. Granite County Power Co. et al.*, 66 M 368, 213 P 604.

Employment is not "casual" within the meaning of the workmen's compensation act (this section and secs. 92-202 and 92-411), in the sense that injuries sustained during the course of such employment are not compensable, if the employment was in the usual course of trade or business of the employer. *Industrial Acc. Board v. Brown Bros. Lumber Co.*, 88 M 375, 292 P 902.

Id. An injury is received in the course of employment, under the above rule, when it occurs while the workman is doing the duty which he is employed to perform, though the employment be but temporary or casual.

Id. A truck driver was directed by his employer to deliver a load of cement in a neighboring town; on his return the truck became mired in a mud-hole from which, without help, he was unable to extricate it; he so informed the employer by phone, who advised him that the truck

was needed in his business and to procure help. The person procured to assist him was injured in an attempt to extricate the truck. Held, under the above rules, that under the circumstances the helper was employed to work for the truck driver's employer in the course of the latter's business, that the fact that the helper's employment was but temporary or casual was, therefore, of no importance, and hence that the injury sustained by the helper was compensable under the provisions of the workmen's compensation act.

Where a dentist also operated for gain a large apartment house, in the construction of an addition to which plaintiff employee was injured, the former's contention, in an action for damages, that the latter's employment was "casual," i.e., not in the usual course of trade, business or profession of defendant, and that therefore the provision of section 92-201 (workmen's compensation act), making unavailable certain defenses to an employer, did not apply to him (sec. 92-202), held not maintainable, since a person may be engaged in more than one business, trade or profession; the building of the addition to the apartment house having been in furtherance of defendant's apartment house business, plaintiff's employment was in the usual course of that business. *Nelson v. Stukey*, 89 M 277, 300 P 287.

Workmen's Compensation—263 et seq.

71 C.J. Workmen's Compensation § 179.

What is casual employment? 33 ALR 1452; 60 ALR 1195 and 107 ALR 934.

92-437. (2889) Plant of the employer includes what. "The plant of the employer" shall include the place of business of a third person while the employer has access to or control over such place of business for the purpose of carrying on his usual trade, business, or occupation.

History: En. Sec. 6, Ch. 96, L. 1915; re-en. Sec. 2889, R. C. M. 1921.

Operation and Effect

Held, that where a railroad company delivered empty cars and transported loaded ones over a spur track constructed to a point near a coal mine, and the portion of the track where the coal company placed loaded cars was indispensable to the conduct of its business, and one of the latter company's employees was injured while attempting to set a defective brake on a loaded car which he was moving while in the course of his employment, the injury occurred at the "plant"

of his employer, entitling him to compensation. *Black v. Northern Pac. Ry. Co.*, 66 M 538, 545, 214 P 82.

Injury sustained by foreman of company which was employed by railroad to operate certain of railroad's coal docks, in stepping through hole in floor of pumphouse owned by railroad but controlled by company under its contract, was result of a cause "directly connected with his regular employment," within meaning of this section, so as to preclude foreman from recovering from railroad after acceptance of benefits from company under the compensation act; recovery for injuries against a third party

tort-feasor in addition to receiving compensation is permitted if cause of injury has no "direct connection with the regular employment." *Sullivan v. Northern Pac. Ry. Co.*, 24 Fed. Supp. 822, 824; 104 F 2d 517.

References

Bruce v. McAdoo, 65 M 275, 289, 211 P 722.

Workmen's Compensation § 710 et seq.
71 C.J. *Workmen's Compensation* § 438 et seq.

92-438. (2890) Independent contractor defined. "An independent contractor" is one who renders service in the course of an occupation, representing the will of his employer only as the result of his work, and not as to the means by which it is accomplished.

History: En. Sec. 6, Ch. 96, L. 1915; re-en. Sec. 2890, R. C. M. 1921.

Independent Contractor Injured Taking Orders From Another's Employee Entitled To Compensation

Where an operator of a wrecker service was called upon at night by an employee of a highway construction company to assist in righting a trailer which had turned over in a ditch, and during the righting operation, conducted under the direction and supervision of the company's employee, was killed by a passing automobile, while signalling passing traffic as directed by the company's employee, held that he was for the time an employee of the company and not an independent contractor, and his widow entitled to compensation, the rule of advance agreement as to price for securing a certain result not applicable here. *Grief v. Industrial Accident Fund*, 108 M 519, 522, 93 P 2d 961.

Operation and Effect

An "independent contractor" (excluded from the benefits of the workmen's compensation act), generally speaking, is one employed to perform work on condition that he is free from the control of the employer as respects the manner in which

the details thereof are to be executed. *Nelson v. Stukey*, 89 M 277, 300 P 287.

Id. A building construction foreman who was paid a daily wage with a promise of two per cent commission if he would speed operations and the cost of the building would not exceed a stated amount, and who was subject to the will and control of the owner as to the means of accomplishing the work, the latter exercising general supervision and issuing orders to the workmen with power in both, however, to hire and discharge men, held not to have been an independent contractor within the meaning of the workmen's compensation act.

Question of Law

It is only where the evidence is reasonably susceptible of but a single inference that the question whether one is an employee or independent contractor becomes one of law for the court's decision. *Nelson v. Stukey*, 89 M 277, 300 P 287.

Workmen's Compensation § 304 et seq.
71 C.J. *Workmen's Compensation* § 181 et seq.

Independence of contract considered with relation to the scope and construction of statutes. 43 ALR 335.

CHAPTER 5

COMPENSATION TO CERTAIN HEIRS AND BENEFICIARIES

- Section 92-501. Compensation to children, brothers and sisters and invalid children—when ceases.
92-502. When compensation to beneficiaries, major or minor dependents or widow ceases.
92-503. Compensation not paid to nonresident major or minor dependents.
92-504. Compensation to beneficiary not residing in United States.
92-505. Compromise with nonresident.
92-506. No compensation to nonresident beneficiaries until when.
92-507. Payment to nonresident beneficiaries made to whom.
92-508. Compensation paid to parent or guardian.

92-501. (2891) Compensation to children, brothers and sisters and invalid children—when ceases. In computing compensation to children and

to brothers and sisters, only those under eighteen (18) years of age, except as hereinafter provided, shall be included.

Orphan children or orphan brothers and sisters, under the age of twenty-one (21) years, and invalid children over the age of twenty-one (21) years shall also be included, and in case of invalid children, only during the period during which they are under that disability, all within the maximum limitations elsewhere in this act provided, after which payments on account of such person or persons shall cease.

Compensation to children, or brothers and sisters, except orphans and invalid children, shall cease when such persons reach the age of eighteen (18) years, and in all cases shall cease when such person marries; provided that for the purpose of determining the amount of compensation due to injured employees, as provided in sections 92-701, 92-702, 92-703 and 92-709, no child or children, or brother or sister over the age of eighteen (18) years, except invalid children, shall be considered. An orphan as defined herein shall mean a child who is bereaved of both parents.

History: En. Sec. 7, Ch. 96, L. 1915; re-en. Sec. 2891, R. C. M. 1921; amd. Sec. 7, Ch. 121, L. 1925; amd. Sec. 1, Ch. 53, L. 1937.

NOTE.—For cases citing workmen's compensation act (secs. 92-101 to 92-1222) as an entirety, see references under section 92-101.

References

Cited or applied as section 7 (a), chapter 96, laws of 1915, in *Morgan v. Butte Central Min. etc. Co.*, 58 M 633, 639, 194 P 496.

Workmen's Compensation 448 et seq., 481, 482.

71 C.J. *Workmen's Compensation* §§ 290 et seq., 306 et seq.

92-502. (2892) When compensation to beneficiaries, major or minor dependents or widow ceases. If any beneficiaries or major or minor dependents of a deceased employee die, or if the widow or widower remarry, the right of such beneficiary or major or minor dependent or such widow or widower to compensation under this act shall cease.

History: En. Sec. 7, Ch. 96, L. 1915; re-en. Sec. 2892, R. C. M. 1921.

Operation and Effect

In determining the amount of a lump sum settlement under section 92-715, the industrial accident board must ascertain the present worth of the claimant's right to compensation, taking into consideration his expectancy of life, and in the case of a widow the added contingency of remarriage, the happening of either contingency destroying the right to continued monthly payments, and therefore the right of converting them into a lump sum. *Cogdill v. Aetna Life Ins. Co. et al.*, 90 M 244, 252, 2 P 2d 292.

The widow of a decedent workman and her two minor children were his beneficiaries under the provisions of the workmen's compensation act. She remarried and thereafter made application for a lump sum settlement of the amounts still

remaining due, in the form of a letter, signing it in her name as it was before remarriage. The board granted the request. In an action by the guardian of the minors appointed after the death of the mother to recover the amount involved in the lump sum settlement on the ground that the board acted without authority in making it, held, that the mother at the time she signed the application for conversion, having then remarried, was no longer a beneficiary, rendering the action of the board void in the absence of an application for conversion signed by a beneficiary. *Davis v. Industrial Accident Board*, 92 M 503, 509, 15 P 2d 919.

Workmen's Compensation 493 et seq.

71 C.J. *Workmen's Compensation* § 312 et seq.

Termination of right to compensation by marriage. 96 ALR 976.

92-503. (2893) Compensation not paid to nonresident major or minor dependents. No compensation under this act, except as otherwise provided

by treaty, shall be paid to any major or minor dependents not residing within the United States at the time of the injury to the decedent.

History: En. Sec. 8, Ch. 96, L. 1915; Workmen's Compensation 411, 489.
re-en. Sec. 2893, R. C. M. 1921. 71 C.J. Workmen's Compensation §§ 275 et seq., 310 et seq.

Cross-Reference

Nonresidents of United States not to receive compensation, sec. 92-708.

92-504. (2894) Compensation to beneficiary not residing in United States. Except as otherwise provided by treaty, no compensation in excess of fifty per centum (50%) of the compensation provided in this act shall be payable to any beneficiary not residing within the United States at the time of the injury to the decedent; provided, however, that no compensation shall be allowed to any nonresident, alien beneficiary who is a citizen of a government having compensation law which excludes citizens of the United States, either resident or nonresident, from partaking of the benefit of such law in the same degree as herein extended to nonresident beneficiaries.

History: En. Sec. 8, Ch. 96, L. 1915;
re-en. Sec. 2894, R. C. M. 1921.

92-505. (2895) Compromise with nonresident. Nothing in the preceding section shall prevent the compromise of any sums due a beneficiary not residing in the United States at the time of the injury to the decedent for a sum less than fifty per centum (50%) of the compensation provided in this act, upon the approval of the board of such compromise settlement.

History: En. Sec. 8, Ch. 96, L. 1915; Workmen's Compensation 2065 et seq.
re-en. Sec. 2895, R. C. M. 1921. 71 C.J. Workmen's Compensation § 1466 et seq.

92-506. (2896) No compensation to nonresident beneficiaries until when. Before payment of compensation to a beneficiary not residing within the United States, satisfactory proof of such relationship as to constitute a beneficiary under this act shall be furnished by such beneficiary, duly authenticated under seal of an officer of a court of law in the country where such beneficiary resides, at such times and in such manner as may be required by the board. And such proof shall be conclusive as to the identity of such beneficiary, and any other claim of any other person to any such compensation shall be barred from and after the filing of such proof.

History: En. Sec. 8, Ch. 96, L. 1915;
re-en. Sec. 2896, R. C. M. 1921.

92-507. (2897) Payment to nonresident beneficiaries made to whom. Payment of compensation to a beneficiary not residing within the United States may be made to any plenipotentiary, or consul, or consular agent within the United States, representing the country in which such nonresident beneficiary resides, and the written receipt of such plenipotentiary, or consul, or consular agent shall acquit the employer, the insurer, or the board, as the case may be.

History: En. Sec. 9, Ch. 96, L. 1915; Workmen's Compensation 1003 et seq.
re-en. Sec. 2897, R. C. M. 1921. 71 C.J. Workmen's Compensation § 1354 et seq.

92-508. (2898) Compensation paid to parent or guardian. Where payment is due to a child under eighteen years of age or to a person adjudged

incompetent, the same shall be made to the parent or to the duly appointed guardian, as the case may be, and the written receipt of such parent or guardian shall acquit the employer, the insurer or board, as the case may be, of further liability. In other cases, payment shall be made to the person entitled thereto or to his duly authorized representative.

History: En. Sec. 9, Ch. 96, L. 1915; re-en. Sec. 2898, R. C. M. 1921; amd. Sec. 8, Ch. 121, L. 1925.

Operation and Effect

The fact that, where a widow and child are beneficiaries under the workmen's compensation act, the compensation due to both may be paid to the former does not authorize treatment of the entire amount due them as belonging to the mother alone, nor conversion thereof into a lump sum at the latter's request, an undivided portion thereof belonging to, and being dedicated to the support of, the child. *Cogdill v. Aetna Life Ins. Co. et al.*, 90 M 244, 257, 2 P 2d 292.

The widow of a decedent workman and her two minor children were his beneficiaries under the provisions of the workmen's compensation act. She remarried and thereafter made application for a lump sum settlement of the amounts still remaining due, in the form of a letter, signing it in her name as it was before remarriage. The board granted the request.

In an action by the guardian of the minors appointed after the death of the mother to recover the amount involved in the lump sum settlement on the ground that the board acted without authority in making it, held, that the mother at the time she signed the application for conversion, having then remarried, was no longer a beneficiary, rendering the action of the board void in the absence of an application for conversion signed by a beneficiary. *Davis v. Industrial Accident Board*, 92 M 503, 508 et seq., 15 P 2d 919.

Id. Where, after remarriage of their mother, minors are the sole beneficiaries of a decedent workman under the workmen's compensation act, the only person authorized to sign an application for conversion of the monthly payments into a lump sum settlement is their guardian appointed under the general statutes relating to guardians (secs. 91-4501 to 91-4526), impliedly intended by the legislature to apply in such a situation.

CHAPTER 6

CLAIMS—LIABILITY FOR INJURY UNDER DIFFERENT PLANS OF ACT

- Section 92-601. Claims must be presented within what time.
 92-602. Exception in cases of minors and incompetents as to period of limitation.
 92-603. Repealed.
 92-604. Employer liable when lets work to other than independent contractor.
 92-605. Presumption when employer lets work by contract.
 92-606. When contractor performing casual employment becomes the employer.
 92-607. Work to be paid for in property other than money—wages.
 92-608. Compensation in case of death of employee—determination of beneficiary, etc.
 92-609. Examination of employee by physician—request or order for—physician may testify.
 92-610. Contracts or agreements for hospital benefits, conditions governing.
 92-611. Hospitals to be under supervision of board.
 92-612. Liability for treatment or malpractice in case of hospital service.
 92-613. Questions of law in certain actions.
 92-614. Who liable for injuries under the different plans of act and in what amounts.

92-601. (2899) Claims must be presented within what time. In case of personal injury or death, all claims shall be forever barred unless presented in writing under oath to the employer, the insurer, or the board, as the case may be, within twelve months from the date of the happening of the accident, either by the claimant or some one legally authorized to act for him in his behalf.

History: En. Sec. 10, Ch. 96, L. 1915; 2899, R. C. M. 1921; amd. Sec. 1, Ch. 34, amd. Sec. 3, Ch. 100, L. 1919; re-en. Sec. L. 1935.

Failure of Employer to File Answer Where Claim Not Filed—Assertion That Defense Waived Without Merit

Where claimant for compensation did not file his claim within the time required by this section, defendant employer was not required to file an answer or state a defense orally before the industrial accident board, and therefore claimant's assertion that by such failure the employer waived its right to make defense has no merit. *Williams v. Anaconda Copper Min. Co.*, 96 M 204, 207 et seq., 29 P 2d 649.

Operation and Effect

Held, that the provision of this section making it incumbent upon a claimant for compensation to present his claim in writing under oath to the employer, insurer or the industrial accident board, within six months after the accident, or it "shall be forever barred," is mandatory, and that the liberality of construction enjoined by the act holding that because of delay in transmission of papers to and from a foreign country, where the widow of decedent employee resided, presentation of the claim after the expiration of the six-months' period was timely. *Chmielewska v. Butte & Superior Min. Co.*, 81 M 36, 41 et seq., 261 P 616.

Compliance with the provisions of this section, requiring an injured workman seeking compensation under the workmen's compensation act to present his claim within six months from the date of the happening of the accident, is indispensable to the existence of the right to maintain proceedings to compel payment. *Williams v. Anaconda Copper Min. Co.*, 96 M 204, 207 et seq., 29 P 2d 649.

Held, before amendment of sec. 92-706, where industrial accident board, on the claim of an employee who lost no wages by his injury, assumed jurisdiction by allowing a physician's claim for medical services furnished employee, and it later developed that the employee had become totally blind in one eye, the board's jurisdiction on the claim continued so that it could award compensation for the loss of the eye. *Gugler v. Industrial Accident Board*, 117 M 38, 45, 156 P 2d 89.

"Under Oath"; Time Limitation

The verification is no part of a plead-

ing; its absence is waived by failure to object to the defect, and, on objection, the defect may be cured by amendment of the pleading on file, and where only defect in claim for compensation under this act was that it was not verified and was returned to claimant to verify, the fact that the time within which to file had expired before it was returned although it had originally been filed on time, held, no justification for rejecting it. *Chisholm v. Vocational School For Girls*, 103 M 503, 507, 64 P 2d 838.

When Estopped from Relying on Limitation

Held, in an action by a claimant under the workmen's compensation act against the insurance carrier of his employer to recover compensation for injuries sustained in the course of his employment, in which the defense was that the claim was barred by this section because not filed within the six months' period provided for therein, that under the doctrine of equitable estoppel defendant was barred from asserting the limitation by the course of conduct of a local insurance agency, clothed with ostensible authority by defendant in handling a prior claim by plaintiff, in repeatedly advising him that his claim would be taken care of, by sending claimant to a physician for the purpose of procuring an X-ray, telling him that a representative of the insurer was coming to look into the claim, who however never did come, etc., all of which justified the claimant in believing that a written claim would not be required, he not being advised to the contrary until the time for filing it had expired. *Lindblom v. Employers' etc. Assur. Corp.*, 88 M 488, 492, 295 P 1007.

References

Maki v. Anaconda Copper Min. Co., 87 M 314, 319 et seq., 287 P 170; *State v. Industrial Acc. Board et al.*, 90 M 386, 393, 23 P 2d 253; *Kerruish v. Industrial Accident Board*, 112 M 556, 559, 118 P 2d 1049.

Workmen's Compensation—1269 et seq.
71 C.J. Workmen's Compensation § 789 et seq.

Time of filing claim. 78 ALR 1294.

92-602. (2900) Exception in cases of minors and incompetents as to period of limitation. No limitation of time as provided in section 92-601 or in this Title, known as workmen's compensation act, shall run as against any injured workman who is mentally incompetent and without a guardian, or an injured minor under eighteen (18) years of age who may be without a parent or guardian. A guardian in either case may be appointed by any

court of competent jurisdiction in which event the period of limitations as provided for in section 92-601, shall begin to run on the date of appointment of such guardian, or when such minor arrives at the age of eighteen (18) years, whichever date may be the earlier.

History: En. Sec. 10, Ch. 96, L. 1915; re-en. Sec. 2900, R. C. M. 1921; amd. Sec. 9, Ch. 121, L. 1925; amd. Sec. 1, Ch. 79, L. 1939; amd. Sec. 5, Ch. 235, L. 1947.

Constitutionality Of Proposed Amendment

The amendment to this section proposed by Ch. 79, L. 1939 (92-602), excepting workmen employed by school districts from the prescribed limitation of time within which claims for injuries must be presented to the party liable, or from the filing of claims with the industrial accident board, etc., held unconstitutional as being a special act in the nature of class legislation in contravention of art. V, sec. 26 of the constitution. *Kerruish v. Industrial Accident Board*, 112 M 556, 557, 118 P 2d 1049.

Operation and Effect

Under this section, the limitation of six months from the date of an industrial accident within which an injured workman must file his claim for compensation does not apply where the claimant was mentally incompetent for some time thereafter; under such conditions the statute does not begin to run until he regains his competency. *Maki v. Anaconda Copper Min. Co.*, 87 M 314, 320, 287 P 170.

Id. Held, that the provision of this section, that no limitation of time "as provided in the preceding section (92-601) or in this act" (for presentation in writing of a claim for compensation) shall run against a workman while mentally incompetent, applies as well to the requirement of section 92-807, with reference to service of notice of injuries received upon the employer or insurer.

92-603. (2900.1) Repealed—Chapter 235, laws of 1947.

92-604. (2901) Employer liable when lets work to other than independent contractor. Where any employer procures any work to be done, wholly or in part for him, by a contractor other than an independent contractor, and the work so procured to be done is a part or process in the trade or business of such employer, then such employer shall be liable to pay all compensation under this act to the same extent as if the work were done without the intervention of such contractor. And the work so procured to be done shall not be construed to be "casual employment."

History: En. Sec. 11, Ch. 96, L. 1915; re-en. Sec. 2901, R. C. M. 1921.

Workmen's Compensation—186 et seq.
71 C.J. Workmen's Compensation § 121 et seq.

Construction and application of term "business" as used in provisions of Workmen's Compensation Act. 106 ALR 1502.

92-605. (2902) Presumption when employer lets work by contract. Where any employer procures work to be done as specified in the preceding section, such contractor and his employees shall be presumed to have elected to come under that plan of compensation adopted by the employer, unless they shall have otherwise elected, as provided herein.

History: En. Sec. 11, Ch. 96, L. 1915; re-en. Sec. 2902, R. C. M. 1921.

92-606. (2903) When contractor performing casual employment becomes the employer. Where any employer procures any work to be done, wholly or in part for him, by a contractor, where the work so procured to be done is casual employment as to such employer, then such contractor shall become the employer for the purposes of this act.

History: En. Sec. 11, Ch. 96, L. 1915; re-en. Sec. 2903, R. C. M. 1921.

92-607. (2904) Work to be paid for in property other than money—wages. Where any employer procures any work to be done, payment for which is to be made in property other than money or its equivalent, and the value of which property is speculative or intangible, the wages of the employees receiving such compensation shall be determined by the board in accordance with the going wage for the same or similar work in the district or locality where the same is to be performed; provided, however, that where an employer procures any work to be done by any contractor, or through him by a subcontractor, the payment for which is to be made in property other than money or its equivalent, and the value of which property is speculative or intangible, then and in that event, the employer shall not be liable for compensation, but such liability shall fall upon the contractor or subcontractor, as the case may be.

History: En. Sec. 11, Ch. 96, L. 1915; Workmen's Compensation § 801 et seq.
 re-en. Sec. 2904, R. C. M. 1921. 71 C.J. Workmen's Compensation § 520 et seq.

92-608. (2905) Compensation in case of death of employee—determination of beneficiary, etc. If an injured employee dies and the injury was the proximate cause of such death, then the beneficiary, or the major or minor dependents of the deceased, as the case may be, shall receive the same compensation as though the death occurred immediately following the injury, but the period during which the death benefit shall be paid shall be reduced by the period during or for which compensation was paid for the injury.

If the employee shall die from some cause other than the injury, there shall be no liability for compensation after his death.

The question as to who constitutes a beneficiary, or a major or minor dependent, shall be determined as of the date of the happening of the accident to the employee, whether death shall immediately result therefrom or not.

History: En. Sec. 12, Ch. 96, L. 1915;
 re-en. Sec. 2905, R. C. M. 1921.

83 M 152, 155, 269 P 403; Hendy v. Industrial Accident Board, 115 M 516, 520, 146 P 2d 324.

NOTE.—For cases citing workmen's compensation act (secs. 92-101 to 92-1222) as an entirety, see references under section 92-101.

Workmen's Compensation § 908 et seq.
 71 C.J. Workmen's Compensation § 562 et seq.

References

Goodwin v. Elm Orlu Min. Co. et al.,

92-609. (2906) Examination of employee by physician—request or order for—physician may testify. Whenever in case of injury the right to compensation under this act would exist in favor of any employee, he shall, upon the written request of his employer or the insurer, submit from time to time to examination by a physician, who shall be provided and paid for by such employer or insurer, and shall likewise submit to examination from time to time by any physician selected by the board, or any member or examiner, or referee thereof.

The request or order for such examination shall fix a time and place therefor, due regard being had to the convenience of the employee and his physical condition and ability to attend at the time and place fixed. The employee shall be entitled to have a physician, provided and paid for by

himself, present at any such examination. So long as the employee, after such written request, shall fail or refuse to submit to such examination, or shall in any way obstruct the same, his right to compensation shall be suspended. Any physician employed by the employer, the insurer, or the board, who shall make or be present at any such examination, may be required to testify as to the results thereof.

History: En. Sec. 13, Ch. 96, L. 1915; re-en. Sec. 2906, R. C. M. 1921.

Operation and Effect

The provision of this section requiring a claimant under the workmen's compensation act to submit to examination by a physician from time to time at the request of employer or insurer, though mandatory, at the peril of having his compensation suspended for noncompliance, held not self-executing. *Burns v. Aetna Life Ins. Co. et al.*, 95 M 186, 187 et seq., 26 P 2d 175.

Id. Where a woman claimant under the workmen's compensation act whose hand

had been injured in a laundry had submitted herself to a number of examinations by physicians, but refused to go to a hospital for a period of from four to six days for the purpose of making experiments as to the effect of hot water on the injured hand, the court properly held that the demand was unreasonable.

Workmen's Compensation—1305 et seq.
71 C.J. Workmen's Compensation § 814 et seq.

Injured employee's duty as to submission to examination. 6 ALR 1270 and 41 ALR 866.

92-610. (2907) Contracts or agreements for hospital benefits, conditions governing. Nothing in this act shall be construed as preventing employers and workmen from waiving the provisions of section 92-706, and entering into mutual contracts or agreements providing for hospital benefits and accommodations to be furnished to the employee.

Such hospital contract or agreements must provide for medical, hospital and surgical attendance for such employee for sickness contracted during the employment, except venereal diseases and sickness as a result of intoxication, as well as for injuries received arising out of and in the course of the employment.

No assessment of employees for such hospital contracts or benefits shall exceed one dollar (\$1.00) per month for each employee, except in cases where it shall appear to the satisfaction of the board, after a hearing had for that purpose, that the actual cost of such service exceeds the said sum of one dollar (\$1.00) per month, and any such finding of the board may be modified at any time when justified by a change of conditions, or otherwise, either upon the board's own motion, or the application of any party in interest.

No profit, directly or indirectly, shall be made by any employer as a result of such hospital contract or assessments. It is the purpose and intent of this act to provide that where hospitals are maintained by employers, such hospitals shall be no more than self-supporting from assessments of employees, and that where hospitals are maintained by other than the employer, all sums derived by assessment of employees shall be paid in full to such hospital without deduction by the employer. All contracts provided for herein shall be subject to the provisions of section 92-706, in so far as the same relates to cases of inadequate medical and hospital facilities.

Whenever, in the opinion of the board, it is necessary for an employee to have specialized medical and hospital service not furnished by the contracting hospital or physician the industrial accident board is authorized

to direct that such specialized medical and hospital treatment be given, and to pay for the same with a properly drawn warrant on the industrial accident fund, not exceeding the sum of three hundred dollars (\$300.00), where the workman is under plan three and the insurance carrier under plans one and two, provided, however, that this section shall apply only in cases where the average number of employees paying a monthly fee on the hospital and medical contract is less than two hundred and fifty employees.

All contracts mentioned herein shall be filed with the board, which shall have full power to approve or disapprove any such contract, and no payment shall be legally collectable under any such contract or incidental thereto until approval thereof by the board.

History: En. Sec. 14, Ch. 96, L. 1915; re-en. Sec. 2907, R. C. M. 1921; amd. Sec. 1, Ch. 177, L. 1929.

Employer Not Required To Furnish Care By Other Than Contractor

An employer who has entered into a hospital contract pursuant to the workmen's compensation act under this section and sec. 92-706, for supplying hospital, medical and surgical care to all employees assenting thereto, in consideration of a \$1 assessment deducted from their wages, may not be forced by an employee to furnish him such care by other than the contracting hospital, physician or surgeon for illness (appendicitis in the instant case) occurring during the employment. *Kelly v. Montana Power Co.*, 111 M 118, 119, 106 P 2d 339.

Hospital, etc. Contract One Made For Benefit Of Third Persons

A contract made pursuant to the workmen's compensation act for supplying hospital, medical and surgical care to all employees assenting thereto, under this section and section 92-706, is one made for the benefit of third persons, the employees, who, upon its acceptance by them, become entitled to enforce it, in accordance with its terms under sec. 13-204. *Kelly v. Montana Power Co.*, 111 M 118, 121, 106 P 2d 339.

Operation and Effect

A contract entered into between an employer of labor and a hospital in conformity with this section, under which the hospital was bound to provide medical and surgical attendance to the employee for sickness contracted during his employment, except where chargeable to his own vice, as well as for injuries arising out of and in the course of the employment, must be construed in the light of the true intent and purposes of the act, which became a part of it. *Murray Hospital v. Angrove*, 92 M 101, 110 et seq., 10 P 2d 577.

Id. Contract between an employer, working under plan No. 1 of the work-

men's compensation act, for hospitalization of his employees pursuant to this section, held not open to the charge that whereas under companion section 92-706, hospitalization is intended to be free, under the contract the employer was enabled to reap a profit, this section, the provisions of which were substantially followed in the contract, in effect providing that the employer shall not retain, nor have returned to him by the hospital, any part of the money withheld from the wages of the employees for hospital purposes, and where the employer maintains his own hospital, it shall be no more than self-sustaining.

Id. Under the rule that the provisions of the workmen's compensation act must be liberally construed, held that an injury sustained by an employee while on his way to work constitutes "sickness" in its popular significance, i.e., an affection of the body which deprives it temporarily of its power to fulfill its usual functions, within the meaning of this section, authorizing a contract between the employer and a hospital for medical attendance to employees, *inter alia*, for sickness contracted during their employment.

When Act Becomes Part of Contract

A contract entered into between a mining company and a hospital for the hospitalization of its employees under the workmen's compensation act (sec. 92-610 et seq.) must be construed in the light of the intent and purpose of the act which became a part of the contract. *Sample v. Murray Hospital*, 103 M 195, 197, 201, 62 P 2d 241.

References

London G. & A. Co., Ltd. v. Indus. Acc. Bd., 82 M 304, 266 P 1103; *Herberson v. Great Falls Wood & Coal Co.*, 83 M 527, 273 P 294; *Landeau v. Toole County Refining Co.*, 85 M 41, 277 P 615.

Workmen's Compensation §961 et seq.
71 C.J. Workmen's Compensation §487 et seq.

Workmen's Compensation Act as affecting master's duty and liability under contract to furnish medical treatment to employees. 33 ALR 1204.

92-611. (2908) Hospitals to be under supervision of board. Each and every hospital maintained wholly or in part by payments from workmen, which furnishes treatment and services to employees for sickness and injury, as provided in this act, shall be under the supervision of the board as to the services and treatment rendered such employees, and shall, from time to time, make reports of such services, attendances, treatments, receipts, and disbursements as the board may require.

History: En. Sec. 14, Ch. 96, L. 1915; re-en. Sec. 2908, R. C. M. 1921.

92-612. (2909) Liability for treatment or malpractice in case of hospital service. Neither an employer, an insurer, nor the board, shall be liable in any way for any act in connection with the treatment or care, or malpractice in treatment or care, of any sickness or injury sustained by an employee, or the beneficiary of any hospital contract, where such act or treatment or malpractice in treatment is caused, or alleged to have been caused, by any physician, hospital, or attendant furnished by such employer, insurer, or the board.

History: En. Sec. 14, Ch. 96, L. 1915; re-en. Sec. 2909, R. C. M. 1921; amd. Sec. 6, Ch. 235, L. 1947.

Not Applicable Where Company Selects Incompetent First-aid Attendant

In an action by employee against mining company to recover damages for personal injuries caused by negligent treatment of plaintiff's injured eye by the

company's first-aid attendant resulting in loss of sight of the eye, held, that the company's assertion that under this section the action is condemned, is not meritorious, because not based upon "malpractice" in any sense of the term, but upon want of care in selecting an incompetent first aid attendant on the part of the company. *Vesel v. Jardine Mining Co.*, 110 M 82, 105, 100 P 2d 75.

92-613. (2910) Questions of law in certain actions. In any action to recover damages for any act connected with the treatment or care, or malpractice in treatment or care, of any sickness or injury sustained by an employee, the question of whether or not due care was given by the defendants shall be a question of law for the court.

History: En. Sec. 15, Ch. 96, L. 1915; re-en. Sec. 2910, R. C. M. 1921.

Wrongful Refusal Of Hospital To Receive Patient

Held, that where the damages sought were based upon an alleged wrongful refusal of a hospital to receive a mining company's employee suffering from pneu-

monia, and who died four days after such refusal, the court committed error in submitting the issues to the jury. *Sample v. Murray Hospital*, 103 M 195, 201, 62 P 2d 241.

Workmen's Compensation §§2253, 2254.
71 C.J. Workmen's Compensation §§1659, 1660.

92-614. (2911) Who liable for injuries under the different plans of act and in what amounts. Every employer who shall become bound by and subject to the provisions of compensation plan number one, and every employer and insurer who shall become bound by and subject to the provisions of compensation plan number two, and the industrial accident fund where the employer of the injured employee has become bound by and subject to the provisions of compensation plan No. 3, shall be liable for the payment of compensation in the manner and to the extent hereinafter provided to an employee who has elected to come under this act, and who shall re-

ceive an injury arising out of and in the course of his employment, or, in the case of his death from such injury, to his beneficiaries, if any; or, if none, to his major dependents, if any; or, if none, to his minor dependents, if any.

History: En. Sec. 16, Ch. 96, L. 1915; re-en. Sec. 2911, R. C. M. 1921.

NOTE.—See annotations under sec. 92-418 also.

Act of God

The terms of the workmen's compensation act are sufficiently comprehensive to include injury resulting from an act of God; thus, death resulting to an employee of a county, from lightning, while he is engaged at work on a public road, is death resulting from an industrial accident, but there can be no recovery therefor without proof that the injury causing death arose "out of" and "in the course of" the employment. *Wiggins v. Industrial Accident Board*, 54 M 335, 342, 170 P 9.

Employers Not Insurers Of Employees At All Times

Employers are not made insurers of their employees at all times during their period of employment under the workmen's compensation act, and unless claimants for compensation under that act received injuries arising out of and in the course of their employment, there can be no recovery of compensation. *Griffin v. Industrial Accident Fund*, 111 M 110, 115, 106 P 2d 346.

Injury Arising Out Of and in the Course of Employment—When and When Not

The phrase "injury arising out of and in the course of his employment," means that to warrant payment of compensation, the facts must disclose that the injury or death, as the case may be, resulted from an industrial accident, arising out of and in the course of the employment. These terms are employed conjunctively, and not disjunctively, and the burden of proof is upon the claimant to establish, by a preponderance of the evidence, that the three of these conditions are met. *Wiggins v. Industrial Accident Board*, 54 M 335, 342, 170 P 9.

Id. An injury to a workman arises "out of" his employment if it is the result of exposure to a hazard peculiar to the employment, or of exposure to more than the normal risk to which the people of the community generally are subject.

The workmen's compensation act, in so far as it provides compensation to an injured employee for injuries received from an accident growing out of and in the course of his employment, is exclusive of all other remedies. *Wirta v. North*

Butte Mining Co. et al., 64 M 279, 285, 210 P 332.

Id. Held, that injuries to a miner caused by smoke and gas incident to a fire in the mine, and sustained by him after he had ceased working and while he was compelled to remain therein until rescued, arose out of and in the course of his employment, and that, having agreed to be bound by the provisions of the workmen's compensation act, he was bound by the provision making the compensation allowed by it exclusive of all other remedies, and was therefore barred from bringing an independent action for damages.

Where an industrial accident occurs while an employee is going to or from work on the premises of his employer and using ways of ingress and egress furnished by the latter, without deviation for purposes of his own, the injury suffered by reason of the accident will be held to arise out of and in the course of his employment. *Nicholson v. Round-up Coal Min. Co. et al.*, 79 M 358, 374, 257 P 270.

Id. Held, that the death of a coal miner who was predisposed to heart disease, from shock while coming from work in the mine in which the temperature was very high and passing through an air course into which ice-cold air was being forced by means of a fan, rendering the temperature therein very low, was due to an "industrial" accident arising out of and in the course of his employment.

If there is a causal connection shown between the injury of an employee claiming compensation under the workmen's compensation act and the business in which he was employed substantially contributing to the injury, liability exists, and the fact that the injury occurred on a public road or on premises adjacent to those of his employer is not alone conclusive against liability, nor is the fact that the danger to which the employee was exposed was one to which the general public was likewise exposed, it being sufficient if the employee was peculiarly subjected to the danger resulting in the accident by reason of his employment. *Herberson v. Great Falls Wood & Coal Co.*, 83 M 527, 534, 273 P 294.

Id. It was the duty of an employee of a coal company each morning before the arrival of others employed at the coal yard to open a gate in the fence surrounding it; for that purpose he had been entrusted with a key. To reach the gate it had been his custom with the knowledge of his employer and without objec-

tion on the part of the employer, after alighting from a street-car, to cross premises adjacent to those of the employer. Alighting from the car on the morning of the accident, some 900 feet from the gate, and moving toward it, he was struck by an automobile, his injuries resulting in death the following day. Held, under the last above rule, that there was a causal connection between his injuries and the duties imposed upon him by his employer, and that the claimant, his widow, was entitled to compensation.

To entitle a workman to compensation under this act he must be able to prove by a preponderance of the evidence the following essential elements: (1) the injury must have resulted from an industrial accident (2) arising out of and (3) in the course of his employment; the term arising "out of" presupposing a causal connection between the employment and the injury, and the words "in the course of" referring to the time, place and circumstances under which the accident took place. *Landeen v. Toole County Refining Co.*, 85 M 41, 277 P 615.

The workmen's compensation act is not framed on the theory of life insurance for employees, but on that of compensation for injuries sustained in the course of employment, and the burden rests upon the claimant to establish by a preponderance of the evidence that the injury or death proximately resulted from an industrial accident arising out of and in the course of employment. *Kerns v. Anaconda Copper Min. Co.*, 87 M 546, 289 P 563.

Id. A laborer about an ore sampler had for a number of years been suffering from a large ulcer on the front of one of his legs between the knee and the ankle. Physicians grafted skin on the denuded area of the ulcer successfully and he returned to work, the healed area being bandaged. A week thereafter he died from blood poisoning. His widow, asserting that death was due to an injury sustained by decedent shortly after returning to work in that a rock had struck the healed ulcerous area causing an abrasion through which the infection germs had entered into the blood stream, made claim for compensation under the workmen's compensation act. Both the industrial accident board and the district court on appeal rejected the claim. Held, that the evidence warranted the conclusion that decedent did not sustain an injury to the leg as claimed, but that if he did, such injury was not the proximate cause of his death, but, as found by both the board and district court, the blood poisoning was due to infection from the ulcer prior to the time of the alleged injury.

Where an employee, while on his way to work, was struck by an automobile, his injury did not arise out of and in the course of his employment, and therefore he was neither entitled to compensation nor to hospitalization under the general provisions of the workmen's compensation act. *Murray Hospital v. Angrove*, 92 M 101, 10 P 2d 577.

Heat Prostration—Death Compensable although Heart Disease also Present

Death of cementman caused by extreme heat from cement kilns which he was attending prior to his collapse held compensable under workmen's compensation act and fact that decedent was suffering from heart disease previous to and on the day of his death did not prevent recovery by his widow. *Birdwell v. Three Forks Portland Cement Co.*, 98 M 483, 498, 40 P 2d 43.

Id. Burden is on claimant to prove by a preponderance of the evidence that workman died as the result of an accidental injury, but it was not incumbent upon widow to have an autopsy performed to establish the cause of death.

Death of state highway employee caused by heat prostration while working on oil-surfaced highway on mid-July afternoon held compensable under workmen's compensation act, and fact he lived eleven days after injury did not affect widow's right to recover compensation. *Ryan v. Industrial Accident Board*, 100 M 143, 151, 45 P 2d 775.

Evidence held insufficient to establish that pneumonia, which caused death, was the result of accidental injury claimed to have been suffered when plow handle held by workman struck his chest. *Doty v. Industrial Accident Fund*, 102 M 511, 520, 59 P 2d 783.

Neurosis Compensable

A disabling neurosis which has been caused by an accidental injury is compensable under the workmen's compensation act. *Sykes v. Republic Coal Co.*, 94 M 239, 245, 21 P 2d 732; *Best v. London Guarantee & Acc. Co.*, 100 M 332, 344, 47 P 2d 456; *O'Neil v. Industrial Accident Board*, 107 M 176, 182, 81 P 2d 688.

In a lightning case the question for decision is whether accident arose out of and in the course of employment, or if by reason of his employment he was exposed to greater danger of being struck than others in same locality; where claimant's husband ordered to place metal pipe on iron scrap pile, after rain, near trees, pole, and wire fence, where lightning struck more frequently, held, decedent's employment increased danger, and widow

entitled to compensation. *Sullivan v. Roman Catholic Bishop et al.*, 103 M 117, 122, 61 P 2d 838.

Evidence in which claimant asserted that the death of the workman was caused by broncho-pneumonia induced by a fall while unloading ties, which caused a rectal abscess necessitating an operation from which he made normal recovery but left him so weak that after returning to work in a mine he contracted pneumonia from which he died a few days later, held so unsubstantial as to warrant a finding of the industrial accident board that there was no connection between the alleged fall and the death of the workman justifying dismissal of the claim. *Nigretto v. Industrial Accident Fund*, 111 M 83, 86, 106 P 2d 178.

Where a city fireman upon completing his eight-hour night shift and while on his way home, fell on an ice-covered sidewalk sustaining injuries from which he died, his widow held not entitled to compensation under plan 3 of the workmen's compensation act, the injuries not having arisen in the course of his employment; the question of whether or not she was entitled to both firemen's pension and workmen's compensation held, unnecessary of decision under the above holding. (Sec. 11-1926.) *Griffin v. Industrial Accident Fund*, 111 M 110, 115, 106 P 2d 346.

Id. A workman is not entitled to compensation for injuries received while traveling to and from his place of work, by an instrumentality not under the control of his employer and when he is subjected only to the ordinary street hazards common to all pedestrians; otherwise when as a part of his employment he is using the streets or highways in carrying on the work of his employer.

Id. Unless the instrumentality causing injury to a workman or the premises on which the injury occurred were used in connection with the actual place of work where the employer carried on his business, there can be no recovery under the workmen's compensation act; but if the

employee is injured while carrying on the business of the employer, there is liability even though the injury occurred off the latter's premises or through an instrumentality not under the employer's control.

Not Founded on Theory of Life Insurance

While workmen's compensation act must be liberally construed, it does not contemplate that employer is insurer of employee at all times during his period of employment, nor is it founded on the theory of life insurance or a social insurance law. *Sullivan v. Roman Catholic Bishop et al.*, 103 M 117, 125, 61 P 2d 838.

Act Does Not Provide Measure of Damages in Tort Action

In action by employee for negligence of employer who had not elected to be bound by the workmen's compensation act, held that the compensation provided by the act is not to be taken as a yardstick to measure plaintiff's damages, since the compensation is not based upon a cause of action for tort and omits entirely the element of pain and suffering. *Chancellor v. Hines Motor Supply Co.*, 104 M 603, 615, 69 P 2d 597.

When to Determine Who Is a Dependent

In determining whether a claimant was a dependent, the board is not concerned with problematical future conditions, but only with the condition of the claimant at the time of the injury to the decedent. *Morgan v. Butte Central Min. etc. Co.*, 58 M 633, 644, 194 P 496.

References

Black v. Northern Pac. R. Co., 66 M 538, 546, 214 P 82.

Workmen's Compensation—186 et seq., 230 et seq., 511 et seq.

71 C.J. Workmen's Compensation §§ 121 et seq., 158 et seq., 327 et seq.

CHAPTER 7

COMPENSATION FOR VARIOUS INJURIES—AMOUNT—PAYMENT

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|---------|---|
| Section | 92-701. Compensation for injury producing temporary total disability. |
| | 92-702. Compensation for injury producing total disability permanent in character. |
| | 92-703. For partial disability—for an injury producing partial disability. |
| | 92-704. Compensation for injury causing death. |
| | 92-705. Providing for payment of burial expense. |
| | 92-706. Medical and hospital services and such other treatment as approved by the board to be furnished. |
| | 92-707. Compensation from what date paid. |
| | 92-708. Compensation to run consecutively—major and minor dependents not residing in the United States—manner of payment. |

- 92-709. Compensation in case of specified injuries.
- 92-710. Hernia cases.
- 92-711. Paralysis of limbs considered loss thereof.
- 92-712. Adjustment of compensation in case of further injuries.
- 92-713. Compensation in case of changes in degree of injury.
- 92-714. Payments made how.
- 92-715. Monthly payments converted into a lump sum.

92-701. (2912) Compensation for injury producing temporary total disability. For an injury producing temporary total disability. Where the injured employee has no wife, child, father, mother, brother or sister residing within the United States who would be entitled to compensation in case of his death, fifty per centum (50%) of the weekly wages received at the time of the injury, subject to a maximum compensation of seventeen dollars and fifty cents (\$17.50) per week; where the injured employee has a wife, or child, or father, or mother, or brother, or sister residing within the United States who would be entitled to compensation in case of his death, fifty-five per centum (55%) of the weekly wages received at the time of the injury, subject to the maximum compensation of nineteen dollars and fifty cents (\$19.50) per week; where the injured employee has a wife and one child, or two children, or a father and mother, or two or more brothers and/or sisters residing within the United States who would be entitled to compensation in case of his death, sixty per centum (60%) of the weekly wages received at the time of the injury, subject to a maximum compensation of twenty dollars and fifty cents (\$20.50) per week; where the injured employee has a wife and two children, or three children residing within the United States who would be entitled to compensation in case of his death, sixty-two and one-half per centum (62½%) of the weekly wages received at the time of the injury, subject to the maximum compensation of twenty-one dollars and fifty cents (\$21.50) per week; where the injured employee has a wife and three children, or four children residing within the United States who would be entitled to compensation in case of his death, sixty-five per centum (65%) of the weekly wages received at the time of the injury, subject to a maximum compensation of twenty-two dollars and fifty cents (\$22.50) per week; where the injured employee has a wife and four or more children, or five or more children residing in the United States who would be entitled to compensation in case of his death sixty-six and two-thirds per centum (66⅔%) of the weekly wages received at the time of the injury, subject to a maximum compensation of twenty-three dollars and fifty cents (\$23.50) per week, and subject in all cases to a minimum compensation of ten dollars and fifty cents (\$10.50) per week, and subject to change when the number of beneficiaries or dependents decreases. Such compensation shall be paid during the period of disability, but for the period not exceeding three hundred (300) weeks from the date of injury.

History: En. Sec. 16, Ch. 96, L. 1915; amd. Sec. 4, Ch. 100, L. 1919; re-en. Sec. 2912, R. C. M. 1921; amd. Sec. 10, Ch. 121, L. 1925; amd. Sec. 12, Ch. 177, L. 1929; amd. Sec. 1, Ch. 230, L. 1947.

Compensation Is Based On a Six-Day Week

Held, that in awarding compensation, this section must be construed in con-

nection with secs. 92-422 and 92-423, the first of which declares that six working days shall constitute a week, and the latter providing that the word "wages" means the average daily wage received for the usual hours of employment in a day, overtime not being considered; hence an injured miner, working under the five-day week rule at \$5.25 per day, was correctly awarded \$21 for 26 weeks for total tem-

porary disability, on the basis of a six-day week, the maximum prescribed by this section. *House v. Anaconda Copper Mining Co.*, 113 M 406, 409, 126 P 2d 814.

Married Man With Wife and Child

This section providing for compensation of an injured workman for injury producing temporary total disability, where claimant has a wife and child under eighteen years of age, judgment awarding compensation at rate of \$18 per week for a total of 300 weeks held correct. *Best v. London Guarantee & Accident Co.*, 100 M 332, 345, 47 P 2d 456.

Act Does Not Provide Measure of Damages in Tort Action

In action by employee for negligence of employer who had not elected to be bound by the workmen's compensation act, held that the compensation provided by the act is not to be taken as a yardstick to measure plaintiff's damages, since the compensation is not based upon a cause of action for tort and omits entirely the element of pain and suffering. *Chancellor v. Hines Motor Supply Co.*, 104 M 603, 615, 69 P 2d 597.

Operation and Effect

The period of temporary total dis-

ability for which compensation is prescribed by this section is the temporary period immediately after the accident during which the employee is totally incapacitated for work by reason of the illness attending the injury—the healing period; if complete recovery then ensues, compensation ceases; if that total disability proves permanent, payment is governed by section 92-702; if only partial, he is also entitled to compensation provided for in such a case within the limitations prescribed. *Dosen v. East Butte Copper Min. Co.*, 78 M 579, 600 et seq., 254 P 880.

References

Sullivan v. Anselmo Mining Corp. et al., 82 M 543, 554, 268 P 495; *Sykes v. Republic Coal Co.*, 94 M 239, 248, 21 P 2d 732; *Woin v. Anaconda Copper Min. Co.*, 99 M 163, 43 P 2d 663; *Paulich v. Republic Coal Co.*, 110 M 174, 182, 102 P 2d 4; *Wieri v. Anaconda Copper Mining Co.*, 116 M 524, 526, 156 P 2d 838.

Workmen's Compensation § 836 et seq.

71 C.J. Workmen's Compensation § 535 et seq.

Compensation for temporary total disability in addition to compensation for permanent partial disability. 88 ALR 385.

92-702. (2913) Compensation for injury producing total disability permanent in character. For an injury producing total disability permanent in character. Where the injured employee has no wife, child, father, mother, brother or sister residing within the United States who would be entitled to compensation in case of his death, fifty per centum (50%) of the weekly wages received at the time of the injury, subject to a maximum compensation of seventeen dollars and fifty cents (\$17.50) per week; where the injured employee has a wife, or child, or father, or mother, or brother, or sister residing within the United States who would be entitled to compensation in case of his death, fifty-five per centum (55%) of the weekly wages received at the time of the injury, subject to a maximum compensation of nineteen dollars and fifty cents (\$19.50) per week; where the injured employee has a wife and one child, or two children, or a father and mother, or two or more brothers and/or sisters, residing within the United States who would be entitled to compensation in case of his death, sixty per centum (60%) of the weekly wages received at the time of the injury, subject to a maximum compensation of twenty dollars and fifty cents (\$20.50) per week; where the injured employee has a wife and two children, or three children residing within the United States who would be entitled to compensation in case of his death, sixty-two and one-half per centum (62½%) of the weekly wages received at the time of the injury, subject to a maximum compensation of twenty-one dollars and fifty cents (\$21.50) per week; where the injured employee has a wife and three children, or four children residing within the United States who would be entitled to compensation in case of

his death, sixty-five per centum (65%) of the weekly wages received at the time of the injury, subject to a maximum compensation of twenty-two dollars and fifty cents (\$22.50) per week; where the injured employee has a wife and four children, or five or more children residing within the United States who would be entitled to compensation in case of his death, sixty-six and two-thirds per centum (66 $\frac{2}{3}$ %) of the weekly wages received at the time of the injury, subject to a maximum compensation of twenty-three dollars and fifty cents (\$23.50) per week; and subject in all cases to a minimum compensation of ten dollars and fifty cents (\$10.50) per week, and subject to change when the number of beneficiaries or dependents decreases. Such compensation shall be paid during the period of disability, but for the period not exceeding five hundred (500) weeks from the date of injury.

History: En. Sec. 16, Ch. 96, L. 1915; amd. Sec. 5, Ch. 100, L. 1919; re-en. Sec. 2913, R. C. M. 1921; amd. Sec. 11, Ch. 121, L. 1925; amd. Sec. 13, Ch. 177, L. 1929; amd. Sec. 2, Ch. 230, L. 1947.

Definition

Disability, within the meaning of the workmen's compensation act, is not total where it appears that the claimant's earning power is not wholly destroyed and he is still capable of performing remunerative employment; in such a case he must make an active effort to procure such work as he can still perform; and one alleging that he is totally incapacitated from obtaining remunerative employment has the burden of proving it by satisfactory evidence. *Dosen v. East Butte Copper Min. Co.*, 78 M 579, 600 et seq., 254 P 880.

Duty of Board When Total Disability Shown

When decision of board and district court, that employer had not enrolled under workmen's compensation act and no insurance was in force at time of accident, was reversed and cause was remanded with direction that the board allow compensation to claimant in accordance with the statute and the original record showed claimant was totally disabled, the board was not authorized to hold a hearing prior to making an award of compensation and writ of mandate would issue to compel such award. Under its continuing jurisdiction the board might thereafter hold hearing to determine whether degree of disability or number of dependents had changed. *State ex rek Miller v. Industrial Accident Board et al.*, 102 M 206, 210, 56 P 2d 1087.

Duty of Board Where Permanency of Injury in Doubt

After the industrial accident board had made a finding that a claimant was totally disabled and then made an award of \$16.50 per week for 78 weeks, without limiting the payment to that amount, but

dissatisfied claimant appealed to the district court which erroneously found that he was not only totally, but permanently disabled, it is the duty of the board, after payment of the 78 weeks compensation, under its continuing jurisdiction to make such further order with reference to compensation as claimant's condition may justify, up to the maximum allowed by law. *Kelly v. West Coast Construction Co.*, 106 M 463, 467, 78 P 2d 1078.

Act Does Not Provide Measure of Damages in Tort Action

In action by employee for negligence of employer who had not elected to be bound by the workmen's compensation act, held that the compensation provided by the act is not to be taken as a yardstick to measure plaintiff's damages, since the compensation is not based upon a cause of action for tort and omits entirely the element of pain and suffering. *Chancellor v. Hines Motor Supply Co.*, 104 M 603, 615, 69 P 2d 597.

Maximum Weekly Compensation Allowable

Under this section, the maximum compensation allowable for permanent total disability is \$15; hence an allowance at the rate of \$18 per week was error. *Moffett v. Bozeman Canning Co. et al.*, 95 M 347, 361, 26 P 2d 973.

Nature of Disability and Compensation to Which Claimant Entitled

Where a coal miner in the course of his employment lost his left eye, receiving therefor full compensation under the provisions of the workmen's compensation act, and nine years later while working at the same occupation under a different employer again suffered an accident destroying the vision of his right eye, thus rendering him totally blind, he was, under a liberal construction of the act, entitled to compensation as for a total permanent disability for a period of 500 weeks, less payments previously received for 200

weeks, as against the contention that under the act he was only entitled to compensation for the loss of one eye. *McDaniel v. Eagle Coal Co. et al.*, 99 M 309, 312, 43 P 2d 655.

fett v. Bozeman Canning Co. et al., 95 M 347, 361, 26 P 2d 973; *Woin v. Anaconda Copper Min. Co.*, 99 M 163, 43 P 2d 663; *State ex rel. Miller v. Industrial Accident Board*, 102 M 206, 211, 56 P 2d 1087.

References

Novak v. Industrial Accident Board, 73 M 196, 200, 235 P 754; *Sykes v. Republic Coal Co.*, 94 M 239, 248, 21 P 2d 732; *Mof-*

What amounts to total incapacity within Workmen's Compensation Acts. 67 ALR 785 and 98 ALR 729.

92-703. (2914) For partial disability—for an injury producing partial disability. Where the injured employee has no wife, child, father, mother, brother, or sister residing within the United States who would be entitled to compensation in case of his death, fifty per centum (50%) of the difference between the wages received at the time of the injury and the wages that such injured employee is able to earn thereafter, subject to a maximum compensation of seventeen dollars and fifty cents (\$17.50) per week; where the injured employee has a wife, or child, or father, or mother, or brother, or sister residing within the United States who would be entitled to compensation in case of his death, fifty-five per centum (55%) of the difference between the wages received at the time of the injury and the wages that such injured employee is able to earn thereafter, subject to a maximum compensation of nineteen dollars and fifty cents (\$19.50) per week; where the injured employee has a wife and one child, or two children, or a father and mother, or two or more brothers and/or sisters residing within the United States who would be entitled to compensation in case of his death, sixty per centum (60%) of the difference between the wages received at the time of the injury and the wages that such injured employee is able to earn thereafter, subject to a maximum compensation of twenty dollars and fifty cents (\$20.50) per week; where the injured employee has a wife and two children, or three children residing within the United States who would be entitled to compensation in the case of his death, sixty-two and one-half per centum (62½%) of the difference between the wages received at the time of the injury and the wages that such injured employee is able to earn thereafter, subject to a maximum compensation of twenty-one dollars and fifty cents (\$21.50) per week; where the injured employee has a wife and three children, or four children residing within the United States who would be entitled to compensation in case of his death, sixty-five per centum (65%) of the difference between the wages received at the time of the injury and the wages that such injured employee is able to earn thereafter, subject to a maximum compensation of twenty-two dollars and fifty cents (\$22.50) per week; where the injured employee has a wife and four or more children, or five or more children residing within the United States who would be entitled to compensation in case of his death, sixty-six and two-thirds per centum (66⅔%) of the difference between the wages received at the time of the injury and the wages that such injured employee is able to earn thereafter, subject to a maximum compensation of twenty-three dollars and fifty cents (\$23.50) per week; not exceeding, however, the maximum compensation allowed in cases of total disability, and not exceeding the total compensation provided in this act for the total loss of the member causing such partial disability. Such compensation shall be

paid during the period of disability, not exceeding, however, five hundred (500) weeks in cases of permanent partial disability, and fifty (50) weeks in cases of temporary partial disability, subject to change when the number of dependents decreases.

History: En. Sec. 16, Ch. 96, L. 1915; amd. Sec. 6, Ch. 100, L. 1919; re-en. Sec. 2914, R. C. M. 1921; amd. Sec. 2, Ch. 177, L. 1929; amd. Sec. 3, Ch. 230, L. 1947.

Operation and Effect

Construing this section, prior to enactment of chapter 121, laws of 1925, held, in connection with other sections of the act, that the maximum compensation for a permanent partial disability caused by injury to an arm from the elbow down is \$12.50 per week for 180 weeks, the amount to be divided into payments extending over a period not exceeding 150 weeks. *Novak v. Industrial Accident Board*, 73 M 196, 200 et seq., 235 P 754.

Construing this section, prior to amendment by chapter 177, laws of 1929, the measure of compensation for a workman's permanent partial disability arising from internal injuries is one-half of the difference between the wages he received at the time of the accident and the wages he was able to earn thereafter (from time of hearing) paid in weekly installments not to exceed 150 weeks, nor in excess of one-half the maximum compensation allowed in cases of total disability; hence where the total of one-half the difference between the wages earned before the injury and what claimant could thereafter earn for 150 weeks exceeds the total of \$3,750—one-half the maximum compensation allowed for total disability at \$15 per week for 500 weeks—allowance of the

excess is illegal. *Sullivan v. Anselmo Mining Corp. et al.*, 82 M 543, 549 et seq., 268 P 495.

Partial disability, permanent in character, by reason of loss of a member of the body, is compensable under the schedule provided in section 92-709, while such disability caused by an injury other than the loss of a member is covered by this section. *Sykes v. Republic Coal Co.*, 94 M 239, 248, 249, 21 P 2d 732.

Act Does Not Provide Measure of Damages in Tort Action

In action by employee for negligence of employer who had not elected to be bound by the workmen's compensation act, held that the compensation provided by the act is not to be taken as a yardstick to measure plaintiff's damages, since the compensation is not based upon a cause of action for tort and omits entirely the element of pain and suffering. *Chancellor v. Hines Motor Supply Co.*, 104 M 603, 615, 69 P 2d 597.

References

Dosen v. East Butte Copper Min. Co., 78 M 579, 600, 254 P 880; *Elich v. Industrial Accident Board*, 116 M 144, 148, 149, 154 P 2d 793.

Workmen's Compensation \S 856 et seq.
71 C.J. Workmen's Compensation \S 541 et seq.

92-704. (2915) Compensation for injury causing death. For beneficiaries residing within the United States. Where decedent leaves one beneficiary, fifty per centum (50%) of the wages received at the time of the injury, subject to a maximum compensation of seventeen dollars and fifty cents (\$17.50) per week; where decedent leaves two beneficiaries, fifty-five per centum (55%) of the wages received at the time of the injury, subject to a maximum compensation of nineteen dollars and fifty cents (\$19.50) per week; where decedent leaves three beneficiaries, sixty per centum (60%) of the wages received at the time of the injury, subject to a maximum compensation of twenty dollars and fifty cents (\$20.50) per week; where decedent leaves four beneficiaries, sixty-two and one-half per centum (62½%) of the wages received at the time of the injury, subject to a maximum compensation of twenty-one dollars and fifty cents (\$21.50) per week; where decedent leaves five beneficiaries, sixty-five per centum (65%) of the wages received at the time of the injury, subject to a maximum compensation of twenty-two dollars and fifty cents (\$22.50) per week; where decedent leaves six or more beneficiaries, sixty-six and two-thirds per centum (66⅔%) of the wages received at the time of the injury, subject to a maximum com-

pensation of twenty-three dollars and fifty cents (\$23.50) per week, and subject in all such cases to a minimum compensation of ten dollars and fifty cents (\$10.50) per week.

For beneficiaries residing outside of the United States: Where decedent leaves one beneficiary, forty per centum (40%) of the compensation which would be payable to such beneficiary, if residing within the United States; where decedent leaves two beneficiaries, forty-five per centum (45%) of the compensation which would be payable to such beneficiaries, if residing within the United States; where decedent leaves three beneficiaries, forty-seven and one-half per centum (47½%) of the compensation which would be payable to such beneficiaries, if residing within the United States; where decedent leaves four or more beneficiaries, fifty per centum (50%) of the compensation which would be payable to such beneficiaries, if residing within the United States.

If decedent leaves no beneficiaries, then compensation shall be payable as follows: To his major dependents, if any, residing in the United States at the date of the happening of the injury; where decedent leaves one major dependent, fifty per centum (50%) of the wages received at the time of the injury, subject to a maximum compensation of seventeen dollars and fifty cents (\$17.50) per week; where decedent leaves two major dependents, fifty-five per centum (55%) of the wages received at the time of the injury, subject to a maximum compensation of nineteen dollars and fifty cents (\$19.50) per week.

If the decedent leaves no major dependents, compensation shall be payable to his minor dependents, if any, if residing within the United States at the time of the happening of the injury, as follows: Where decedent leaves one minor dependent, thirty per centum (30%) of the wages received at the time of the injury; where decedent leaves two minor dependents, thirty-five per centum (35%) of the wages received at the time of the injury; where decedent leaves three or more minor dependents, forty per centum (40%) of the wages received at the time of the injury.

All such payments of compensation provided for in this section shall be subject to a maximum compensation of twenty-three dollars and fifty cents (\$23.50) per week for a period not exceeding four hundred (400) weeks and subject to change when the number of beneficiaries or dependents decreases, and provided, further, that compensation payable to major or minor dependents shall not exceed the amount of the dependency.

History: En. Sec. 16, Ch. 96, L. 1915; amd. Sec. 7, Ch. 100, L. 1919; re-en. Sec. 2915, R. C. M. 1921; amd. Sec. 12, Ch. 121, L. 1925; amd. Sec. 14, Ch. 177, L. 1929; amd. Sec. 4, Ch. 230, L. 1947.

Operation and Effect

Construing prior to amendment by chapter 177, laws of 1929, under the workmen's compensation act as amended by chapter 121, laws of 1925, a major dependent (father or mother) is entitled to compensation for injuries to a son resulting in death, only to the extent of his or her actual dependency upon the earnings of decedent. *Edwards v. Butte & Superior Min. Co.*, 83 M 122, 126, 270 P 634.

Id. Held, that the mother of a workman whose injuries received in the course of his employment resulted in his death was wholly dependent upon his earnings at the time of the accident, where it appeared that the monthly living expenses of claimant, a widow with two minor children attending school, were \$100, that her only income aside from his earnings consisted of a pension of \$16 per month and a sum of money intermittently earned by one of the children in selling papers occasionally, amounting to \$7 a week, and that the state of her health made it impossible for her to secure employment; held, further, that she, as a major depend-

ent, was entitled to compensation at the maximum rate.

Act Does Not Provide Measure of Damages in Tort Action

In action by employee for negligence of employer who had not elected to be bound by the workmen's compensation act, held that the compensation provided by the act is not to be taken as a yardstick to measure plaintiff's damages, since the compensation is not based upon a cause of action for tort and omits entirely the element of pain and suffering. *Chancellor v. Hines Motor Supply Co.*, 104 M 603, 615, 69 P 2d 597.

References

Nicholson v. Roundup Coal Min. Co. et

al., 79 M 358, 384, 257 P 270; *Cogdill v. Aetna Life Ins. Co. et al.*, 90 M 244, 252 et seq., 2 P 2d 292; *Ross v. Industrial Accident Board*, 106 M 486, 492, 80 P 2d 362; *Hendy v. Industrial Accident Board*, 115 M 516, 520, 146 P 2d 324.

Workmen's Compensation 908 et seq.
71 C.J. *Workmen's Compensation* § 562 et seq.

Deductions allowable in computing earnings as basis of death benefits. 22 ALR 864.

Time as of which earnings considered in computing compensation for death ultimately resulting from causes not immediately operative. 86 ALR 524.

Deducting disability benefits in computing death benefits. 115 ALR 900.

92-705. (2916) Providing for payment of burial expense. There shall be paid, in case of the death of an employee, which death is the result of an accidental injury arising out of the employment and happening in the course of the employment, the reasonable burial expenses of the employee, not exceeding two hundred and fifty dollars (\$250.00) and such payment is not a part of the compensation which might be paid but is a benefit in addition to and separate and apart from compensation.

History: En. Sec. 16, Ch. 96, L. 1915; amd. Sec. 2, Ch. 196, L. 1921; re-en. Sec. 2916, R. C. M. 1921; amd. Sec. 13, Ch. 121, L. 1925; amd. Sec. 1, Ch. 128, L. 1943; amd. Sec. 1, Ch. 213, L. 1945.

References

Herberson v. Great Falls Wood & Coal Co., 83 M 527, 539, 273 P 294.

Workmen's Compensation 961 et seq.
71 C.J. *Workmen's Compensation* § 487 et seq.

92-706. (2917) Medical and hospital services and such other treatment as approved by the board to be furnished. In addition to the compensation provided by this act and as an additional benefit separate and apart from compensation, the following shall be furnished:

During the first nine (9) months after the happening of the injury, the employer or insurer or the board, as the case may be, shall furnish reasonable services by a physician or surgeon, reasonable hospital services and medicines when needed, and such other treatment approved by the board, not exceeding in amount the sum of five hundred dollars (\$500.00), unless the employee shall refuse to allow them to be furnished, and unless such employee is under hospital contract as provided in section 92-610.

When such employee is under a hospital contract as above and when hospital or medical facilities or both are inadequate to the needs of an injured employee in a particular case such injured employee, may, anytime, be placed where adequate hospital facilities are obtainable, and the cost thereof in whole or in part shall be a legal charge against the one so contracting to furnish hospital facilities, and the amount of such charge and the necessity therefor shall be determined by the board.

And be it further provided, that where an injury arising out of and received in the course of employment necessarily results in the loss by amputation of an arm, hand, leg or foot, or the enucleation of an eye, or

the loss of any of the natural teeth, the industrial accident board may, in its discretion, order that an artificial member be furnished to supply the loss of any such member or members so lost. Such artificial member shall be furnished at the expense of the employer, operating under plan one, or the insurer, operating under plan two, or the industrial accident fund where the employer is operating under plan three. The expense of furnishing any such member shall not exceed the following amounts: Hand or arm to elbow—one hundred fifty dollars (\$150.00). Arm above elbow—one hundred seventy-five dollars (\$175.00). Foot or leg—one hundred fifty dollars (\$150.00). Eye—ten dollars (\$10.00). Teeth—one hundred twenty-five dollars (\$125.00). The replacement of any such artificial member so furnished shall not be required unless made necessary by a subsequent industrial accident arising out of and suffered in the course of employment.

History: En. Sec. 16, Ch. 96, L. 1915; amd. Sec. 3, Ch. 196, L. 1921; re-en. Sec. 2917, R. C. M. 1921; amd. Sec. 14, Ch. 121, L. 1925; amd. Sec. 15, Ch. 177, L. 1929; amd. Sec. 2, Ch. 139, L. 1931; amd. Sec. 1, Ch. 229, L. 1943; amd. Sec. 2, Ch. 213, L. 1945.

Employer Not Required to Furnish Care by Other Than Contractor

An employer who has entered into a hospital contract pursuant to the workmen's compensation act under this section and sec. 92-610, for supplying hospital, medical and surgical care to all employees assenting thereto, in consideration of a \$1 assessment deducted from their wages, may not be forced by an employee to furnish him such care by other than the contracting hospital, physician or surgeon for illness (appendicitis in the instant case) occurring during the employment. *Kelly v. Montana Power Co.*, 111 M 118, 119, 106 P 2d 339.

Operation and Effect

Construing prior to amendment by chapter 139, laws of 1931, under secs. 92-705 and 92-706, as amended by chapter 121, laws of 1925, claimant, in addition to compensation, was entitled to reasonable surgical and hospital service, not exceeding \$500 and burial expenses not in excess of \$150, and denying these both the industrial accident board and the district court on appeal erred. *Herberson v. Great Falls Wood & Coal Co.*, 83 M 527, 539, 273 P 294.

Construing prior to amendment by chapter 139, laws of 1931, since under this section an employer's liability for medical, surgical and hospital service during the first six months after an employee's injury is limited to \$500, an order of the district court on appeal that, it being unable to fix the amount of such service from the

record of the industrial accident board before it, defendant should pay the reasonable amount due for such service without fixing the maximum amount, held not open to the complaint that under it defendant could be held chargeable with an unlimited amount. *Landeem v. Toole County Refining Co.*, 85 M 41, 49, 277 P 615.

Where an employee, while on his way to work, was struck by an automobile, his injury did not arise out of and in the course of his employment, and therefore he was neither entitled to compensation nor to hospitalization under the general provisions of the workmen's compensation act (sec. 92-706). *Murray Hospital v. Angrove*, 92 M 101, 108 et seq., 10 P 2d 577.

On the facts presented, held that industrial accident board, after approving settlement of claim for compensation between employee and insurance carrier, was without jurisdiction to hear proceeding brought by unpaid physician against insurance carrier which had already paid \$500 for surgical and hospital service. *Liest v. United States Fidelity & Guaranty Co.*, 100 M 152, 158, 48 P 2d 772.

Under this section before amendment, held that medical services furnished injured employee is in law a part of the compensation for injury. *Gugler v. Industrial Accident Board*, 117 M 38, 45, 48, 156 P 2d 89.

References

Dosen v. East Butte Copper Min. Co., 78 M 579, 600 et seq., 254 P 880; *London G. & A. Co., Ltd. v. Indus. Acc. Bd.*, 82 M 304, 307 et seq., 266 P 1103; *Rung v. Industrial Accident Board*, 114 M 347, 351, 136 P 2d 754.

Applicability of provisions as to medical service as affected by character or qualifications of persons rendering them. 40 ALR 1265.

92-707. (2918) Compensation from what date paid. Where an injured employee has no wife, child, father, mother, brother or sister residing

within the United States who would be entitled to compensation in case of his death, no compensation shall be allowed or paid during the first two weeks of any injury, except as may be required by the provisions of the preceding section, but if disability continues six weeks, compensation shall be paid from the date of injury. Where the injured employee has a beneficiary or a major or minor dependent residing within the United States who would be entitled to compensation in case of his death, no compensation shall be paid for the first week of any injury, but if disability continues three weeks, compensation shall be paid from the date of injury; provided, that separate benefits of medical and hospital services shall be furnished from date of injury.

History: En. Sec. 16, Ch. 96, L. 1915; amd. Sec. 4, Ch. 196, L. 1921; re-en. Sec. 2918, R. C. M. 1921; amd. Sec. 3, Ch. 177, L. 1929; amd. Sec. 3, Ch. 213, L. 1945.

NOTE.—For cases citing workmen's compensation act (secs. 92-101 to 92-1222) as an entirety, see references under sec. 92-101.

References

Dosen v. East Butte Copper Min. Co., 78 M 579, 600 et seq., 254 P 880; Gugler v. Industrial Accident Board, 117 M 38, 46, 156 P 2d 89.

Workmen's Compensation \Rightarrow 836 et seq.
71 C.J. Workmen's Compensation § 535 et seq.

92-708. (2919) Compensation to run consecutively—major and minor dependents not residing in the United States—manner of payment. Compensation shall run consecutively and not concurrently and payment shall not be made for two (2) classes of disability over the same period, provided that no compensation shall be paid to a major or minor dependent who did not reside within the United States at the date of the happening of the injury. Compensation due to beneficiaries shall be paid to the surviving spouse, if any, or if none, then divided equally among or for the benefit of the children. In cases where beneficiaries are a surviving widow and stepchildren of such widow the compensation shall be divided equally among all beneficiaries. Compensation due to major dependents where there be more than one, shall be divided equitably among them and likewise as to minor dependents, and the question of dependency and amount thereof shall be a question of fact for determination by the board.

History: En. Sec. 16, Ch. 96, L. 1915; re-en. Sec. 2919, R. C. M. 1921; amd. Sec. 15, Ch. 121, L. 1925; amd. Sec. 4, Ch. 213, L. 1945; amd. Sec. 7, Ch. 235, L. 1947.

permanent total, temporary partial and permanent partial disability. Dosen v. East Butte Copper Min. Co., 78 M 579, 601, 254 P 880.

Cross-Reference

Nonresidents of United States not to receive compensation, sec. 92-503.

Operation and Effect

Held, that the provision of this section, that compensation for all classes of injuries other than such as is provided for medical, surgical and hospital attention, and burial benefits, shall run consecutively and not concurrently, the payments succeeding one another in regular order, and that payment shall not be made for two classes of disability over the same period, by the use of the word "classes" refer to the four disabilities mentioned in secs. 92-701 to 92-703, to-wit: temporary total,

References

Nicholson v. Roundup Coal Min. Co. et al., 79 M 358, 384, 257 P 270; Gugler v. Industrial Accident Board, 117 M 38, 46, 156 P 2d 89.

Workmen's Compensation \Rightarrow 487 et seq., 836 et seq.

71 C.J. Workmen's Compensation § 275 et seq.

Payments for separate injuries as concurrent or consecutive. 99 ALR 896.

"Dependency" within the act. 100 ALR 1090.

Maintenance of action for wrongful death for benefit of alien nonresidents. 138 ALR 684.

92-709. (1920) Compensation in case of specified injuries. In case of the following specified injuries, the compensation in lieu of any other compensation provided by this act, shall be as follows: Where the injured employee has no wife, child, father, mother, brother, or sister residing within the United States who would be entitled to compensation in case of his death, fifty per centum (50%) of the wages received at the time of the injury, subject to a maximum compensation of seventeen dollars and fifty cents (\$17.50) per week; where the injured employee has a wife, or child, or father, or mother, or brother, or sister residing within the United States who would be entitled to compensation in case of his death, fifty-five per centum (55%) of the wages received at the time of the injury, subject to a maximum compensation of nineteen dollars and fifty cents (\$19.50) per week; where the injured employee has a wife and one child, or two children, or a father and mother, or two or more brothers and/or sisters residing within the United States who would be entitled to compensation in case of his death, sixty per centum (60%) of the wages received at the time of the injury, subject to a maximum compensation of twenty dollars and fifty cents (\$20.50) per week; where the injured employee has a wife and two children, or three children residing within the United States who would be entitled to compensation in case of his death, sixty-two and one-half per centum (62½%) of the wages received at the time of the injury, subject to a maximum compensation of twenty-one dollars and fifty cents (\$21.50) per week; where the injured employee has a wife and three children, or four children residing within the United States who would be entitled to compensation in case of his death, sixty-five per centum (65%) of the wages received at the time of the injury, subject to a maximum compensation of twenty-two dollars and fifty cents (\$22.50) per week; where the injured employee has a wife and four or more children, or five or more children residing within the United States who would be entitled to compensation in case of his death, sixty-six and two-thirds per centum (66⅔%) of the wages received at the time of the injury, subject to a maximum compensation of twenty-three dollars and fifty cents (\$23.50) per week, subject to change when the number of beneficiaries or dependents decreases, and subject in all cases to a minimum compensation of ten dollars and fifty cents (\$10.50) per week, and shall be paid for the following periods:

For the loss of:

One arm at or near the shoulder.....	200 weeks
One arm at the elbow	180 weeks
One arm between wrist and elbow.....	160 weeks
One hand	150 weeks
One thumb and the metacarpal bone thereof.....	60 weeks
One thumb at the proximal joint	30 weeks
One thumb at the second distal joint	20 weeks
One first finger and the metacarpal bone thereof	30 weeks
One first finger at the proximal joint.....	20 weeks
One first finger at the second joint.....	15 weeks
One first finger at the distal joint.....	10 weeks
One second finger and the metacarpal bone thereof.....	30 weeks
One second finger at the proximal joint.....	15 weeks

One second finger at the second joint	10 weeks
One second finger at the distal joint	5 weeks
One third finger and the metacarpal bone thereof.....	20 weeks
One third finger at the proximal joint.....	12 weeks
One third finger at the second joint.....	8 weeks
One third finger at the distal joint.....	4 weeks
One fourth finger and the metacarpal bone thereof.....	12 weeks
One fourth finger at the proximal joint.....	9 weeks
One fourth finger at the second joint.....	6 weeks
One fourth finger at the distal joint.....	3 weeks
One leg at or near the hip joint as to preclude the use of an artificial limb	200 weeks
One leg at or above the knee where stump remains sufficient to permit the use of an artificial limb.....	150 weeks
One leg between knee and ankle.....	140 weeks
One foot at the ankle.....	125 weeks
One great toe with the metatarsal bone thereof.....	30 weeks
One great toe at the proximal joint.....	15 weeks
One great toe at the second joint.....	10 weeks
One toe other than the great toe with the metatarsal bone thereof	12 weeks
One toe other than the great toe at the proximal joint.....	6 weeks
One toe other than the great toe at second or distal joint.....	3 weeks
One eye by enucleation.....	120 weeks
Total blindness of one eye.....	100 weeks
Total loss of hearing; one ear.....	20 weeks
Total loss of hearing; both ears	120 weeks

The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or any two thereof, in one accident, in the absence of conclusive proof to the contrary shall constitute total disability, permanent in character. Provided, however, that the percentage of permanent disability caused by any single accident or injury shall be so computed as to cover the permanent disability caused by that particular injury without reference to any previous physical ailment or defect or to any injury previously suffered or any permanent disability caused thereby; provided, that no payment under this section shall be in lieu of the separate benefit of medical and hospital services.

History: En. Sec. 16, Ch. 96, L. 1915; amd. Sec. 8, Ch. 100, L. 1919; amd. Sec. 5, Ch. 196, L. 1921; re-en. Sec. 2920, R. C. M. 1921; amd. Sec. 16, Ch. 121, L. 1925; amd. Sec. 16, Ch. 177, L. 1929; amd. Sec. 5, Ch. 213, L. 1945; amd. Sec. 5, Ch. 230, L. 1947.

Operation and Effect

This section, providing that in case of loss of a member of the body of an injured employee, the compensation provided shall be "in lieu of any other compensation," aside from medical and hospital services provided for in sec. 92-706, held to mean that where amputation of a member becomes necessary the compensation provided therefor by this section is exclusive, no

further compensation for disability on that account being allowable, such compensation, however, being, in addition to that theretofor paid him for temporary total disability under sec. 92-701. *Dosen v. East Butte Copper Min. Co.*, 78 M 579, 603, 254 P 880.

Id. Compensation for permanent partial disability and also for specific loss of the use of a member of the body, under this section, cannot be awarded where both result from the same injury.

Id. An injured employee is in duty bound to make use of every available and reasonable means to make himself whole, so far as possible, and therefore may not, upon being advised by the best medical

and surgical talent after many months of treatment that, where the injury was to the lower part of one of his legs, amputation was the only remedy because of an affection of the bone, refuse to submit to the operation and in the meantime draw compensation as for a partial disability; and if he finally submits thereto, payments made to him from the time he first failed to take the surgeon's advice may properly be deducted from the amount found ultimately due him.

Partial disability, permanent in character, by reason of loss of a member of the body, is compensable under the schedule provided in this section, while such disability caused by an injury other than the loss of a member is covered by sec. 92-703. *Sykes v. Republic Coal Co.*, 94 M 239, 248, 21 P 2d 732.

Under this section, the compensation allowed an injured workman for the loss of a foot is "in lieu of any other compensation provided by this act," and therefore additional compensation during the "healing period" may not be allowed. *Rom v. Republic Coal Co.*, 94 M 250, 22 P 2d 161. Id. Under this section, an employee who loses a foot at the ankle is entitled to compensation for the period prescribed, without regard to his ability to return to work within that period.

Where a coal miner in the course of his employment lost his left eye, receiving therefor full compensation under the provisions of the workmen's compensation act, and nine years later while working at the same occupation under a different employer again suffered an accident destroying the vision of his right eye, thus rendering him totally blind, he was, under a liberal construction of the act, entitled to compensa-

tion as for a total permanent disability for a period of 500 weeks, less payments previously received for 200 weeks, as against the contention that under the act he was only entitled to compensation for the loss of one eye. *McDonald v. Eagle Coal Co. et al.*, 99 M 309, 312, 43 P 2d 655.

Act Does not Provide Measure of Damages in Tort Action

In action by employee for negligence of employer who had not elected to be bound by the workmen's compensation act, held that the compensation provided by the act is not to be taken as a yardstick to measure plaintiff's damages, since the compensation is not based upon a cause of action for tort and omits entirely the element of pain and suffering. *Chancellor v. Hines Motor Supply Co.*, 104 M 603, 615, 69 P 2d 597.

References

Novak v. Industrial Accident Board, 73 M 196, 200 et seq., 235 P 754; *London G. & A. Co., Ltd. v. Indus. Acc. Bd.*, 82 M 304, 310, 266 P 1103; *Mulholland v. Butte & Superior Min. Co.*, 87 M 561, 569, 289 P 579; *Gugler v. Industrial Accident Board*, 117 M 38, 46, 156 P 2d 89.

Workmen's Compensation \S 869 et seq.

71 C.J. Workmen's Compensation \S 547 et seq.

Previous loss or mutilation of member as affecting amount or basis of compensation. 30 ALR 979.

Construction and application of provisions that compensation for specific injury shall be exclusive of other compensation. 129 ALR 663.

92-710. (2921) Hernia cases. A workman, in order to be entitled to compensation for hernia, must clearly prove:

- (1) That the hernia is of recent origin;
- (2) That its appearance was accompanied by pain;
- (3) That it was immediately preceded by some accidental strain suffered in the course of employment; and,
- (4) That it did not exist prior to the date of the alleged injury.

If a workman, after establishing his right to compensation for hernia, as above provided, elects to be operated upon, a special operating fee of not to exceed one hundred dollars (\$100.00) shall be paid by the employer, the insurer, or the board, as the case may be. In case such workman elects not to be operated upon, and the hernia becomes strangulated in the future, the results from such strangulation will not be compensated. The employer, insurer or the board, as the case may be shall not be liable for the operating fee or for hospital services contracted more than nine (9) months after the happening of the accident causing the hernia.

History: En. Sec. 16, Ch. 96, L. 1915; 4, Ch. 177, L. 1929; amd. Sec. 8, Ch. 235, re-en. Sec. 2921, R. C. M. 1921; amd. Sec. L. 1947.

Operation and Effect

Held, that this section providing a fee of not to exceed fifty dollars where it becomes necessary to operate on an injured employee for hernia—a section treating specially of hernia alone was not impliedly repealed by sec. 14 of chapter 121, laws of 1925, (sec. 92-706 of this code) providing generally for surgical service when needed, in an amount not to exceed \$500.00 and that therefore the industrial accident board in allowing a fee of \$100.00 for a hernia operation exceeded its authority granted under this section. *London G. & A. Co., Ltd. v. Indus. Acc. Bd.*, 82 M 304, 307 et seq., 266 P 1103.

Time Limit of Six Months Not Applicable

This section is a special statute, and the general time limit of six months within

which medical and hospital service shall be furnished in the ordinary cases under sec. 92-706 does not apply; its enactment without prescribing a specific time in which operations shall be performed to make the expense thereof recoverable, apparently was to encourage repair, since the extent of an injury is not always immediately apparent; as to jurisdictional requirement of notice under sec. 92-807, in view of the board's award of compensation in the first instance, and the record in the instant case, the court did not go back to the award for hernia on that point. *Rung v. Industrial Accident Board*, 114 M 347, 349, 136 P 2d 754.

Workmen's Compensation ⇨ 880.

71 C.J. *Workmen's Compensation* § 551.

Provisions of compensation act as to hernia. 114 ALR 1337.

92-711. (2922) Paralysis of limbs considered loss thereof. For the purpose of section 92-709, the complete paralysis of an arm, hand, foot, or leg shall be considered the loss of such member. For the purpose of said section, the complete paralysis of both arms, both hands, both feet, or both legs, or any two of them, shall be considered the loss of such members.

History: En. Sec. 16, Ch. 96, L. 1915; re-en. Sec. 2922, R. C. M. 1921.

NOTE.—For cases citing workmen's compensation act (secs. 92-101 to 92-1222) as an entirety, see references under sec. 92-101.

References

Novak v. Industrial Accident Board, 73 M 196, 201, 235 P 754.

Workmen's Compensation ⇨ 881 et seq.

71 C.J. *Workmen's Compensation* § 552 et seq.

92-712. (2923) Adjustment of compensation in case of further injuries. Should a further accident occur to a workman who is already receiving compensation hereunder, or who has been previously the recipient of a payment or payments under this act, his further compensation shall be adjusted according to the other provisions of this act, and with regard to his past receipt of compensation.

History: En. Sec. 16, Ch. 96, L. 1915; re-en. Sec. 2923, R. C. M. 1921; amd. Sec. 5, Ch. 177, L. 1929.

References

McDaniel v. Eagle Coal Co. et al., 99 M 309, 43 P 2d 655.

Workmen's Compensation ⇨ 872 et seq.

71 C.J. *Workmen's Compensation* § 549 et seq.

Previous loss or mutilation of member as affecting amount or basis of compensation. 30 ALR 979.

Effect of previous compensation. 96 ALR 1080.

92-713. (2924) Compensation in case of changes in degree of injury. If aggravation, diminution, or termination of disability takes place or be discovered after the rate of compensation shall have been established, or compensation terminated in any case, where the maximum payments for disabilities as provided in this act have not been reached, adjustments may be made to meet such changed conditions by increasing, diminishing or terminating compensation payments in accordance with the provisions of this act.

History: En. Sec. 16, Ch. 96, L. 1915; re-en. Sec. 2924, R. C. M. 1921; amd. Sec. 6, Ch. 177, L. 1929.

Compensation for Full Period of Injury—Continuing Jurisdiction of Board

On the authority of *Meznarich v. Republic Coal Co.*, 101 M 78, 53 P 2d 82, held that an award of compensation should be for the full period of disability, not exceeding the maximum and that the continuing jurisdiction of the industrial accident board may be invoked if the disability (on the facts considered) ceased or otherwise changed. *Lunardello v. Republic Coal Co.*, 101 M 94, 98, 53 P 2d 87.

Continuing Jurisdiction of Board

This section and secs. 92-826 and 92-830 must be construed together and under them no case in which compensation has been awarded shall be finally closed until the maximum period of payments for the disability has expired, except in case of "any final settlement" which becomes final after expiration of the time specified in sec. 92-826, and cases of compromise settlements. The board cannot divest itself of this continuing jurisdiction by designating an order for payment of compensation for a period less than the statutory maximum as

"final." *Mesnarich v. Republic Coal Co.*, 101 M 78, 88, 53 P 2d 82.

Operation and Effect

The intention of the legislature in enacting the workmen's compensation act was that the monthly payment plan provided by this section should be the rule, and the lump sum settlement authorized by the next section, the exception. *Davis v. Industrial Accident Board*, 92 M 503, 507, 15 P 2d 919.

Where claimant petitioned for a rehearing on the ground that his original claim and proof of injury did not conform to the facts, and advanced an entirely new theory of the nature of the injury, the petition was properly dismissed, this section granting power to the board to make adjustments of compensation to meet changed conditions not contemplating reconsideration of a case on such grounds. *Shugg v. Anaconda Copper Mining Co.*, 100 M 159, 167, 46 P 2d 435.

Workmen's Compensation—938 et seq.

71 C.J. Workmen's Compensation § 598 et seq.

Provisions as to further disability. 72 ALR 1125.

92-714. (2925) Payments made how. All payments of compensation, as provided in this act, shall be made at the end of each four (4) week period, except as otherwise provided herein.

History: En. Sec. 16, Ch. 96, L. 1915; re-en. Sec. 2925, R. C. M. 1921; amd. Sec. 9, Ch. 235, L. 1947.

NOTE.—For cases citing workmen's compensation act (secs. 92-101 to 92-1222) as an entirety, see references under sec. 92-101.

92-715. (2926) Monthly payments converted into a lump sum. The monthly payments provided for in this act may be converted, in whole or in part, into a lump sum payment, which lump sum payment shall not exceed the estimated value of the present worth of the deferred payments capitalized at the rate of five per centum per annum. Such conversion can only be made upon the written application of the injured workman, his beneficiary, or major or minor dependents, as the case may be, and shall rest in the discretion of the board, both as to the amount of such lump sum payment and the advisability of such conversion. The board is hereby vested with full power, authority, and jurisdiction to compromise claims and to approve compromises of claims under this act; and all settlements and compromises of compensation provided in this act shall be absolutely null and void without the approval of the board.

History: En. Sec. 16, Ch. 96, L. 1915; amd. Sec. 9, Ch. 100, L. 1919; re-en. Sec. 2926, R. C. M. 1921.

Amount of Lump Sum How Determined

In determining the amount of a lump sum settlement under the above section, the industrial accident board must ascer-

tain the present worth of the claimant's right to compensation, taking into consideration his expectancy of life, and in case of a widow the added contingency of remarriage, the happening of either contingency destroying the right to continued monthly payments, and therefore the right of converting them into a lump sum. Cog-

dill v. Aetna Life Ins. Co. et al., 90 M 244, 251 et seq., 2 P 2d 292.

Commutation Where Widow and Child Are Beneficiaries

The fact that, where a widow and child are beneficiaries under the workmen's compensation act, the compensation due to both may be paid to the former (sec. 92-508, as amended by chapter 121, laws 1925) does not authorize treatment of the entire amount due them both as belonging to the mother alone, nor conversion thereof into a lump sum at the latter's request, an undivided portion thereof belonging to, and being dedicated to the support of, the child. *Cogdill v. Aetna Life Ins. Co. et al.*, 90 M 244, 251 et seq., 2 P 2d 292.

Id. A widow, aged thirty-six, and child, aged ten years, and seven months, were awarded compensation at the rate of \$17 per week for 400 weeks. After receipt of payment for 24 weeks, the widow petitioned for a partial commutation of the award to enable her to secure medical attention for herself. The industrial accident board granted conversion of payment of the last 78 of the remaining 376 weeks' allowance. Held, that it appearing that the board did not take into consideration the contingency of the remarriage of the widow, nor the fact that in case of remarriage the child would be entitled to the \$15 weekly received by the mother (\$2 being allowed for the child), the board committed error in that for 66 weeks of the 78 embraced in the conversion the child would be deprived thereof on the mother's remarriage.

Deferred Payments

The "deferred payments" which the industrial accident board is authorized by this section to convert into a lump sum payment, mean such payments as would ordinarily become payable in the natural course of events, taking into consideration the expectancy of the beneficiary; commutation may not be made where the weekly compensation sought to be commuted may never exist. *Cogdill v. Aetna Life Ins. Co. et al.*, 90 M 244, 251 et seq., 2 P 2d 292.

Discretion of Board

Under this section, the matter of awarding to an injured employee compensation by way of lump sum settlement is within the discretion of the industrial accident board, and that discretion will not be interfered with on appeal unless there appears an abuse of it. *Sullivan v. Anselmo Mining Corp. et al.*, 82 M 543, 557, 268 P 495.

By this section, the application of a beneficiary under the workmen's compensation

act for conversion of monthly compensation payments into a lump sum payment is addressed to the discretion of the industrial accident board, and on appeal the district court in that behalf may act only in review of the action of the board thereon; therefore, where the beneficiary (widow) had asked for conversion but the board had not acted upon the request at the time the insurance carrier appealed from the award made and the district court heard the appeal upon the record certified by the board, which did not disclose that the board had made investigation as to whether or not the widow's request should or should not be granted, the court exceeded its jurisdiction in directing a lump sum payment. *Landeon v. Toole County Refining Co.*, 85 M 41, 46, 277 P 615.

Since the district court has no original jurisdiction under the workmen's compensation act to entertain the question whether an injured employee shall be allowed to have his weekly payments converted into a lump sum settlement, jurisdiction over that matter being lodged in the industrial accident board, the doctrine of *res adjudicata* may not be invoked by the employer-insurer as to that issue, in defense to a petition for a writ of prohibition to the supreme court to restrain the district court from taking further proceedings under a like writ involving the right of the industrial accident board to hear claimant's application for a lump sum settlement after decision on appeal upholding the award made by the board, where that issue was not, and under the facts could not have been, presented to the district court on appeal. *State v. District Court*, 88 M 400, 404, 293 P 291.

Intent of Legislature

The intention of the legislature in enacting the workmen's compensation act was that the monthly payment plan provided by sec. 92-714, should be the rule, and the lump sum settlement authorized by this section, the exception. *Davis v. Industrial Accident Board*, 92 M 503, 507, 15 P 2d 919.

Does Not Apply Unless a Disputed Claim Is Compromised

Requirement of this section that compromise and settlement of a compensation claim be approved by the board does not apply where no claim of the workman had been definitely established and there was no compromise between claimant and employer but a receipt in full settlement of claimant's demand after he had fully recovered and returned to work had been executed by him, the board approving the transaction and declaring that claimant was entitled to what he had received and

received for. *Shugg v. Anaconda Copper Mining Co.*, 100 M 159, 167, 46 P 2d 435.

Power to Make Lump Sum Settlements

Though it evidently was the intention of the legislature in enacting the workmen's compensation act that monthly payments should be the rule and lump sum settlements the exception, under this section, the industrial accident board is authorized to make such latter settlements. *Williams v. Industrial Accident Board*, 109 M 235, 238, 97 P 2d 1115.

When Courts May Decline to Pass on Lump Sum Settlement

Where a compensation claimant made

no request to the industrial accident board for a lump sum settlement, and no evidence appeared in the record on appeal on the question of the necessity or advisability of such a settlement, the trial court properly declined to pass upon the question, and the supreme court on appeal to it will do likewise. *O'Neil v. Industrial Accident Board*, 107 M 176, 184, 81 P 2d 688.

Workmen's Compensation—1006 et seq.

71 C.J. Workmen's Compensation § 604.

Specific grounds for commutation of payment. 69 ALR 547.

CHAPTER 8

MISCELLANEOUS REGULATIONS—POWERS OF BOARD—REHEARINGS AND APPEALS

- Section 92-801. Assignment or attachment of payments.
 92-802. Liability in case of bankruptcy or failure is first lien.
 92-803. Waivers invalid.
 92-804. Misrepresenting pay-roll.
 92-805. Act not to apply to railroads engaged in interstate commerce.
 92-806. Duplicate receipts paid for injuries to be filed—statements of medical expenditures.
 92-807. Notice of claims for injuries other than death.
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 92-809. Confidential information used, how.
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 92-838. Court to give liberal construction to act.

- 92-839. Effect of decision holding any part of act unconstitutional.
- 92-840. Money in industrial accident fund held in trust.
- 92-841. Pending actions not affected by act.
- 92-842. Annual report—copies for general distribution.
- 92-843. When act to take effect.

92-801. (2927) Assignment or attachment of payments. No payments under this act shall be assignable, subject to attachment or garnishment, or be held liable in any way for debts.

History: En. Sec. 17, Ch. 96, L. 1915; Workmen's Compensation 1097 et seq.
 re-en. Sec. 2927, R. C. M. 1921. 71 C.J. Workmen's Compensation § 673 et seq.

92-802. (2928) Liability in case of bankruptcy or failure is first lien. In case of bankruptcy, insolvency, liquidation, or the failure of an employer or insurer to meet any obligations imposed by this act, every liability which may be due under this act shall constitute a first lien upon any deposit made by such employer or insurer, and if such deposit shall not be sufficient to secure the payment of such liability in the manner and at the times provided for in this act, the deficiency shall be a lien upon all the property of such employer or insurer within this state, and shall be prorated with other lienable claims, and shall have preference over the claim of any creditor or creditors of such employer or insurer except the claims of other lienors.

History: En. Sec. 17, Ch. 96, L. 1915; Insolvency of insurer or employer as affecting liability. 8 ALR 1346.
 re-en. Sec. 2928, R. C. M. 1921.

Bankruptcy 345 et seq.; Workmen's Compensation 1029 et seq.
 8 C.J.S. Bankruptcy § 459; 71 C.J. Workmen's Compensation § 1365 et seq.

92-803. (2929) Waivers invalid. No agreement by an employee to waive any rights under this act for any injury to be received shall be valid.

History: En. Sec. 17, Ch. 96, L. 1915; Workmen's Compensation 771 et seq., 1100 et seq.
 re-en. Sec. 2929, R. C. M. 1921. 71 C.J. Workmen's Compensation §§ 9 et seq., 674 et seq.

92-804. (2930) Misrepresenting pay-roll. Any employer who shall misrepresent to the board the amount of a pay-roll upon which the premiums or assessments under compensation plan number three are to be levied, or upon which fees for factory inspection, subsequent inspection, or reinspection, as elsewhere provided in this act, are based, shall be liable to the state in ten times the amount of difference between the amount paid and the amount which should have been paid. Such liability may be recovered in a civil action brought in the name of the state. All sums collected under this section shall be paid into the fund to which the original payments were, or should have been credited.

History: En. Sec. 17, Ch. 96, L. 1915; Workmen's Compensation 2080, 2081.
 re-en. Sec. 2930, R. C. M. 1921. 71 C.J. Workmen's Compensation §§ 1485, 1486.

92-805. (2931) Act not to apply to railroads engaged in interstate commerce. The provisions of this act shall not apply to any railroad engaged in interstate commerce, except that railroad construction work shall be included in and subject to the provisions of this act.

History: En. Sec. 17, Ch. 96, L. 1915;
re-en. Sec. 2931, R. C. M. 1921.

Workmen's Compensation Act as applicable to motor carriers and their employees engaged in interstate commerce. 148 ALR 873.

Workmen's Compensation 95 et seq.
71 C.J. Workmen's Compensation § 49 et seq.

92-806. (2932) Duplicate receipts paid for injuries to be filed—statements of medical expenditures. Every employer coming under the provisions of compensation plan number one, and every insurer coming under the provisions of compensation plan number two, shall, on or before the fifteenth day of each and every month, file with the industrial accident board duplicate receipts for all payments made during the previous month to injured workmen or their beneficiaries or dependents; and statements showing the amounts expended during the previous month for medical, surgical, and hospital services, and for the burial of injured workmen.

History: En. Sec. 17, Ch. 96, L. 1915;
re-en. Sec. 2932, R. C. M. 1921.

Workmen's Compensation 1003 et seq.
71 C.J. Workmen's Compensation § 1354 et seq.

92-807. (2933) Notice of claims for injuries other than death. No claims to recover compensation under this act for injuries not resulting in death shall be maintained unless, within thirty days after the occurrence of the accident which is claimed to have caused the injury, notice in writing, stating the name and address of the person injured, the time and place where the accident occurred, and the nature of the injury, and signed by the person injured, or some one in his behalf, shall be served upon the employer or the insurer, except as otherwise provided in section 92-602; provided, however, that actual knowledge of such accident and injury on the part of such employer or his managing agent or superintendent in charge of the work upon which the injured employee was engaged at the time of the injury shall be equivalent to such service.

History: En. Sec. 17, Ch. 96, L. 1915;
re-en. Sec. 2933, R. C. M. 1921; amd. Sec. 7, Ch. 177, L. 1929.

Id. This section provides that no claim for compensation under the workmen's compensation act shall be maintained unless within thirty days after the accident notice, signed by the injured workman, shall be served upon the employer or insurer, actual notice of the accident and injury on the part of the employer, his managing agent or superintendent in charge, however, being equivalent to such service. Held, that the provision is mandatory, and that where no notice was given and the evidence failed to show that the employer, his managing agent or superintendent in charge had actual knowledge, or that information of the injury possessed by a minor official had been imparted by him to either of the three persons mentioned, the injured workman was barred of recovery.

"Actual Knowledge of the Injury"

Knowledge of employer that employee became sick while at work, was "hurt," or claimant's informing foreman that he had a sore back, does not, in the absence of some knowledge on the part of the employer that some accidental injury was sustained by the employee, amount to actual knowledge of the injury under this section. *State ex rel. Magelo v. Industrial Accident Board*, 102 M 455, 463, 59 P 2d 785.

Operation and Effect

Held, that the provision of amended sec. 92-602, that no limitation of time shall run against a workman while mentally incompetent, applies as well to the requirements of this section with reference to service of notice of injuries received upon the employer or insurer. *Maki v. Anaconda Copper Min. Co.*, 87 M 314, 319 et seq., 287 P 170.

Where the industrial accident board makes a final order, such as that because of the failure of an injured workman to file written notice of the accident resulting in his injury with his employer (insurer) as required by this section, his claim is denied, as distinguishing from an

order interlocutory in character over which it, under sec. 92-826, has continuing jurisdiction, and the claimant fails to appeal therefrom, the matter becomes res adjudicata and may not thereafter be reopened. *State v. Industrial Acc. Board et al.*, 94 M 386, 387 et seq., 23 P 2d 253.

References

Williams v. Anaconda Copper Min. Co., 96 M 204, 207 et seq., 29 P 2d 649; *Magelo v. Industrial Accident Board*, 103 M 477,

478, 479, 64 P 2d 113; *Kerruish v. Industrial Accident Board*, 112 M 556, 560, 118 P 2d 1049; *Rung v. Industrial Accident Board*, 114 M 347, 349, 136 P 2d 754.

Workmen's Compensation 1216 et seq.
71 C.J. *Workmen's Compensation* § 762 et seq.

Requirement of *Workmen's Compensation Act* as to notice of accident or injury. 78 ALR 1232; 92 ALR 505; 107 ALR 815 and 145 ALR 1263.

92-808. (2934) Employers and insurers required to file reports of accidents. Every employer of labor and every insurer is hereby required to file with the board, under such rules and regulations as the board may, from time to time make, a full and complete report of every accident to an employee arising out of or in the course of his employment and resulting in loss of life or injury to such person. Such reports shall be furnished to the board in such form and such detail as the board shall from time to time prescribe, and shall make specific answers to all questions required by the board under its rules and regulations, except, in case he is unable to answer any such questions, a good and sufficient reason shall be given for such failure.

History: En. Sec. 17, Ch. 96, L. 1915;
re-en. Sec. 2934, R. C. M. 1921.

Workmen's Compensation 2082 et seq.
71 C.J. *Workmen's Compensation* § 1486 et seq.

92-809. (2935) Confidential information used, how. No information furnished to the board by an employer or an insurer shall be open to public inspection, or made public except on order of the board, or by the board or a member of the board, in the course of a hearing or proceeding. Any officer or employee of the board who, in violation of the provisions of this section, divulges any information, shall be guilty of a misdemeanor.

History: En. Sec. 17, Ch. 96, L. 1915;
re-en. Sec. 2935, R. C. M. 1921.

92-810. (2936) American experience table of mortality used. Whenever it is necessary to estimate the sum of money to set aside as a reserve in any case, the American experience table of mortality shall be used.

History: En. Sec. 17, Ch. 96, L. 1915;
re-en. Sec. 2936, R. C. M. 1921.

Evidence 364.
32 C.J.S. *Evidence* § 719.

92-811. (2937) Deduction from wages of any part of premium a misdemeanor—hospital contributions. It shall be unlawful for the employer to deduct or obtain any part of any premium required to be paid by this act from the wages or earnings of his workmen, or any of them, and the making or attempt to make any such deduction shall be a misdemeanor, except that nothing in this section shall be construed as prohibiting contributions by employees to a hospital fund, as elsewhere in this act provided.

History: En. Sec. 17, Ch. 96, L. 1915;
re-en. Sec. 2937, R. C. M. 1921.

Workmen's Compensation 2080.
71 C.J. *Workmen's Compensation* § 1485.

92-812. (2938) Hearings and investigations—technical rules. All hearings and investigations before the board, or any member thereof, shall be governed by this act and by rules of practice and procedure to be adopted

by the board, and in the conduct thereof neither the board nor any member thereof shall be bound by the technical rules of evidence. No informality in any proceedings or in the manner of taking testimony shall invalidate any order, decision, award, rule, or regulation made, approved, or confirmed by the board.

History: En. Sec. 18, Ch. 96, L. 1915; re-en. Sec. 2938, R. C. M. 1921.

Hearsay

Under this section the industrial accident board is not bound by the technical rules of evidence, and it may accept or reject hearsay in its discretion. *Ross v. Industrial Accident Board*, 106 M 486, 495, 80 P 2d 362.

Operation and Effect

Under this section, the primary function of the industrial accident board is to ascertain the material facts relating to an accident for which compensation is claimed by the injured workman, disregarding the niceties of ordinary court procedure. *Williams v. Anaconda Copper Min. Co.*, 96 M 204, 210, 29 P 2d 649.

Industrial accident board proceedings in workmen's compensation cases are in nowise regulated by the provisions of the code of civil procedure, which relate only to proceedings in courts, and any informality in any proceeding before the board will not invalidate any order or decision made by it. *State ex rel. Magelo v. Industrial Accident Bd.*, 102 M 455, 461, 59 P 2d 785.

Statement of Decedent to Aid Parents Admissible

Where the intention of a workman to aid in supporting his parents was an important fact in the matter of the parents' claim as his major dependents upon his death, the statement of a witness for claimants, that decedent shortly before his death told him that he intended to send his next pay check to his parents and thereafter every other check, was admissible under this section, as a part of the *res gestae*, and the industrial accident board was not warranted in rejecting the testimony as hearsay. (Sec. 93-401-7.) *Ross v. Industrial Accident Board*, 106 M 486, 495, 80 P 2d 362.

References

Sullivan v. Anselmo Mining Corp. et al., 82 M 543, 555, 268 P 495; *Best v. London Guarantee & Accident Co.*, 100 M 332, 340, 47 P 2d 456.

Workmen's Compensation 338 et seq., 1091 et seq., 1687 et seq.

71 C. J. *Workmen's Compensation* §§ 669 et seq., 850 et seq., 963 et seq.

92-813. (2939) Depositions may be taken. The board, or any member thereof, or any party to the action or proceeding may, in any investigation or hearing before the board, cause the deposition of witnesses residing within or without the state to be taken in the manner prescribed by law for like depositions in civil actions in the district courts of this state, and to that end may compel the attendance of witnesses and the production of books, documents, papers, and accounts.

History: En. Sec. 18, Ch. 96, L. 1915; re-en. Sec. 2939, R. C. M. 1921.

NOTE.—For cases citing workmen's compensation act (secs. 92-101 to 92-1222) as an entirety, see references under sec. 92-101.

References

Sullivan v. Anselmo Mining Corp. et al., 82 M 543, 555, 268 P 495; *Best v. London Guarantee & Accident Co.*, 100 M 332, 341, 47 P 2d 456.

Workmen's Compensation 1686.

71 C.J. *Workmen's Compensation* § 980.

92-814. (2940) Powers of board. The board is hereby vested with full power, authority, and jurisdiction to do and perform any and all things, whether herein specifically designated or in addition thereto, which are necessary or convenient in the exercise of any power, authority, or jurisdiction conferred upon it under this act.

History: En. Sec. 18, Ch. 96, L. 1915; re-en. Sec. 2940, R. C. M. 1921.

Operation and Effect

While the industrial accident board, cre-

ated as a purely administrative body, exercises many functions that are judicial in character, it is not vested with judicial power, in the sense in which that expression is used in the constitution, wherein it means the power of a court to decide, to pronounce a judgment, and to carry it into effect, between persons and parties who bring a case before it for decision. *Shea v. North Butte Min. Co.*, 55 M 522, 536, 179 P 499.

Held, that this section vesting in the board power to do all things necessary in the exercise of the jurisdiction conferred upon it by the workmen's compensation act, in addition to those therein provided for, is procedural in character and has nothing to do with the substantive matter of award of compensation; therefore where the board in reliance upon the authority supposedly conferred by this section "in order to do equity" computed compensa-

tion for a permanent partial disability on a percentage basis instead of following the specific provisions of sec. 92-703, providing the measure of compensation in such cases, it committed error. *Sullivan v. Anselmo Mining Corp. et al.*, 82 M 543, 549, 268 P 495.

Neither this section nor sec. 92-821 gives the board jurisdiction to consider or pass upon the petition of a physician for an award of fees for services rendered an injured workman where compensation had been paid in full and the insurer had paid to a hospital and another doctor who treated the claimant the full amount of \$500.00 as required by sec. 92-706. *Liest v. United States Fidelity & Guaranty Co.*, 100 M 152, 155, 48 P 2d 772.

References

Sykes v. Republic Coal Co., 94 M 239, 248, 21 P 2d 732.

92-815. (2941) Powers to issue writs and process—fees for serving. The board, and each member thereof shall have power to issue writs of summons, warrants of attachment, warrants of commitment, and all necessary process in proceedings for contempt in like manner and to the same extent as courts of record. The process issued by the board or any member thereof shall extend to all parts of the state, and may be served by any persons authorized to serve process of courts of record, or by any person designated for that purpose by the board, or any member thereof.

The person executing any such process shall receive such compensation as may be allowed by the board, not to exceed the fees now prescribed by law for similar service, and such fees shall be paid in the same manner as provided herein for the fees of witnesses.

History: En. Sec. 18, Ch. 96, L. 1915; re-en. Sec. 2941, R. C. M. 1921.

NOTE.—For cases citing workmen's compensation act (secs. 92-101 to 92-1222) as an entirety, see references under sec. 92-101.

References

Cited or applied as sec. 18 (d), chapter

96, laws of 1915, in *Shea v. North Butte Min. Co.*, 55 M 522, 537, 179 P 499; *Sullivan v. Anselmo Mining Corp. et al.*, 82 M 543, 555, 268 P 495.

Workmen's Compensation—1090, 1163, et seq., 1703.

71 C.J. Workmen's Compensation §§ 668, 714 et seq., 981 et seq.

92-816. (2942) Power to administer oaths, certify official acts, issue subpoenas—witness fees and mileage. The board and each member thereof, its secretary and referees, shall have the power to administer oaths, certify to all official acts, and to issue subpoenas for the attendance of witnesses and the production of papers, books, accounts, documents, and testimony in any inquiry, investigation, hearing, or proceeding in any part of the state. Each witness who shall appear by order of the board, or any member thereof shall be entitled to receive, if demanded, for his attendance the same fees and mileage allowed by law to a witness in civil cases in the district court, which amount shall be paid by the party at whose request such witness is subpoenaed, unless otherwise ordered by the board. When any witness, who has not been required to attend at the request of any

party, is subpoenaed by the board, his fees and mileage may be paid from the funds appropriated for the use of the board in the same manner as other expenses of the board are paid. Any witness subpoenaed, except one whose fees and mileage may be paid from the funds of the board, may at the time of service demand the fee to which he is entitled for travel to and from the place at which he is required to appear, and one day's attendance. If such witness demands such fees at the time of service and they are not at that time paid or tendered, he shall not be required to attend before the board, or a member thereof or referee, as directed in the subpoena.

History: En. Sec. 18, Ch. 96, L. 1915;
re-en. Sec. 2942, R. C. M. 1921.

92-817. (2943) Power of district court concerning production of testimony—contempt. The district court in and for the county in which any inquiry, investigation, hearing, or proceeding may be held by the board, or any member thereof, shall have the power to compel the attendance of witnesses, the giving of testimony, and the production of papers, books, accounts, and documents as required by any subpoena issued by the board, or any member thereof. The board, or any member thereof, before whom the testimony is to be given or produced, in case of the refusal of any witness to attend or testify or produce any papers required by such subpoena, may report to the district court in and for the county in which the proceeding is pending, by petition, setting forth that due notice has been given of the time and place fixed for the attendance of said witness, or the production of said papers, and that the witness has been summoned in the manner prescribed in this act, and that the witness has failed and refused to attend, or produce the papers required by the subpoena before the board or any member thereof in the case or proceeding named in the notice and subpoena, or has refused to answer questions propounded to him in the course of such proceedings, and ask an order of said court compelling the witness to attend and testify or produce said papers before the board. The court, upon the petition of the board, or any member of the board, shall enter an order directing the witness to appear before the court at the time and place to be fixed by the court in such order, not more than ten days from the date of the order, and then and there show cause why he had not attended or testified, or produced such papers before the board. A copy of said order shall be served upon said witness. If it shall appear to the court that said subpoena was regularly issued by the board, or a member thereof, and regularly served, the court shall thereupon enter an order that said witness appear at the time and place fixed in said order, and testify or produce the required papers, and upon failure to obey said order, said witness shall be dealt with as for contempt of court. The remedy provided in this section is cumulative, and shall not be construed to impair or interfere with the power of the board, or a member thereof, to enforce the attendance of witnesses and the production of papers, and to punish for contempt, in the same manner and to the same extent as courts of record.

History: En. Sec. 18, Ch. 96, L. 1915; re-en. Sec. 2943, R. C. M. 1921. **NOTE.**—For cases citing workmen's compensation act (secs. 92-101 to 92-1222) as an entirety, see references under sec. 92-101.

References

Cited or applied as sec. 18 (f), chapter 96, laws of 1915, in *Shea v. North Butte Min. Co.*, 55 M 522, 537, 179 P 499.

Workmen's Compensation—1703, 1822 et seq.
71 C.J. Workmen's Compensation §§ 981 et seq., 1121 et seq.

92-818. (2944) Certificates and certified copies as evidence. Copies of official documents and orders filed or deposited according to law in the office of the board, certified to by a member of the board, or by the secretary under the official seal of the board, to be true copies of the original, shall be evidence in like manner as the originals. In any court proceeding, wherein the question as to whether or not an employer or employee has complied with and is operating under or bound by the provisions of the workmen's compensation act of the state of Montana, is a question for determination, a certificate by a member of the board, or by the secretary under the official seal of the board, certifying that such employer or employee has or has not complied with, and is or is not operating under, and is or is not bound by the provisions of the workmen's compensation act of the state of Montana, shall be prima facie evidence thereof.

History: En. Sec. 18, Ch. 96, L. 1915; Workmen's Compensation—1895 et seq.
re-en. Sec. 2944, R. C. M. 1921; amd. Sec. 71 C.J. Workmen's Compensation § 1219
8, Ch. 177, L. 1929. et seq.

92-819. (2945) Apportionment of costs and disbursements—expenses. The costs and disbursements incurred in any proceeding or hearing before the board, or a member thereof, may be apportioned between the parties on the same or adverse sides, in the discretion of the board. Costs and disbursements in any proceeding or hearing, arising out of cases under Plan No. Three may be paid from the industrial accident fund, and in the discretion of the industrial accident board, including the necessary traveling and other expenses and disbursements of the members of the board, its referees or officers or employees incurred while actually conducting investigations, hearings or proceedings, within or without the state of Montana, and also any salaries or expenses including capital expenditures for automobile traveling equipment, including upkeep, required by the board to be incurred for inspections and examinations provided by sections 92-1206 to 92-1210, of places of employment covered under Plan No. Three, may be paid out of the industrial accident fund.

History: En. Sec. 18, Ch. 96, L. 1915; Workmen's Compensation—1987.
re-en. Sec. 2945, R. C. M. 1921; amd. Sec. 3, 71 C.J. Workmen's Compensation § 1348
Ch. 139, L. 1931; amd. Sec. 2, Ch. 162, L. et seq.
1937; amd. Sec. 1, Ch. 184, L. 1947.

92-820. (2946) Books, records and pay-rolls to be open to inspection. The books, records, and pay-rolls of the employer, pertinent to the administration of this act, shall always be open to inspection by the board or any duly authorized employee thereof, for the purpose of ascertaining the correctness of the pay-roll, the number of men employed, and such other information as may be necessary for the board and its management under this act. Refusal on the part of the employer to submit said books, records, and pay-rolls for such inspection shall subject the offending employer to a penalty of one hundred dollars for each offense, to be collected by civil

action in the name of the state, and paid into the industrial administration fund.

History: En. Sec. 19, Ch. 96, L. 1915;
re-en. Sec. 2946, R. C. M. 1921.

Workmen's Compensation 1090, 2080.
71 C.J. Workmen's Compensation §§ 668,
1480.

92-821. (2947) Jurisdiction of board to hear disputes and controversies.

All proceedings to determine disputes or controversies arising under this act shall be instituted before the board, and not elsewhere, and heard and determined by them, except as otherwise in this act provided, and the board is hereby vested with full power, authority, and jurisdiction to try and finally determine all such matters, subject only to review in the manner and within the time in this act provided.

History: En. Sec. 20, Ch. 96, L. 1915;
re-en. Sec. 2947, R. C. M. 1921.

Decisions When Res Adjudicata

An order or decision of the industrial accident board denying a claim for compensation becomes final and res adjudicata on failure of the aggrieved party to take an appeal within time, where the decision was on a question of law or on the merits, but only on the very issue it determined, and the case cannot be thereafter reopened for reconsideration of the questions disposed of. *Meznarich v. Republic Coal Co.*, 101 M 78, 87, 53 P 2d 82.

Scope and Effect of Board's Decision

The board is the trier of fact, and its findings are equivalent to the verdict of a jury or the findings of a court, and where no additional evidence is adduced before the court on appeal, the re-examination is a review and not a trial de novo, so that the decision of the board can be overturned only if, on examining the cold record, it can be said that the evidence clearly preponderates against that decision. (This section and cases cited.) *Doty v. Industrial Accident Fund*, 102 M 511, 518, 59 P 2d 783.

Operation and Effect

The board has quasi-judicial powers, and under this section has jurisdiction finally to determine whether the widow of de-

cedent workman who had not been living with him for four years prior to his death was "legally entitled" to compensation within the meaning of sec. 92-423 providing that only a wife or widow legally entitled to be supported by the deceased falls within the definition of a "beneficiary" under the act, and therefore erred in declining to pass upon the status of claimant in the absence of determination thereof by a court of competent jurisdiction. *Goodwin v. Elm Orlu Min. Co. et al.*, 83 M 152, 158, 269 P 403.

Neither this section nor sec. 92-814 gives the board jurisdiction to consider or pass upon the petition of a physician for an award of fees for services rendered an injured workman where compensation had been paid in full and the insurer had paid to a hospital and another doctor who treated the claimant the full amount of \$500 as required by sec. 92-706. *Liest v. United States Fidelity and Guaranty Co.*, 100 M 152, 155, 48 P 2d 772.

References

Shugg v. Anaconda Copper Mining Co., 100 M 159, 168, 46 P 2d 435; *Paulich v. Republic Coal Co.*, 110 M 174, 187, 102 P 2d 4.

Workmen's Compensation 1177 et seq.
71 C.J. Workmen's Compensation § 720 et seq.

92-822. (2948) Presumption as to legality of rules, orders, findings, etc., of board. All orders, rules, and regulations, findings, decisions, and awards of the board in conformity with law shall be in force and shall be prima facie lawful; and all such orders, rules, and regulations, findings, decisions, and awards shall be conclusively presumed to be reasonable and lawful, until and unless they are modified or set aside by the board or upon review.

History: En. Sec. 20, Ch. 96, L. 1915;
re-en. Sec. 2948, R. C. M. 1921.

NOTE.—For cases citing workmen's compensation act (secs. 92-101 to 92-1222) as an entirety, see references under sec. 92-101.

References

Morgan v. Butte Central M. & M. Co., 58 M 633, 194 P 496; *Radonich v. Anaconda Copper Min. Co.*, 91 M 437, 445, 8 P 2d 658; *Meznarich v. Republic Coal Co.*, 101 M 78, 87, 53 P 2d 82.

Workmen's Compensation 1935.

71 C.J. Workmen's Compensation § 1264.

Necessity, form, and contents of findings of fact to support administrative determination. 146 ALR 123.

92-823. (2949) Time for filing—final findings and awards. After a final hearing by the board, it shall within thirty days make and file its findings upon all facts involved in the controversy, and its award, which shall state its determination as to the right of the parties.

History: En. Sec. 20, Ch. 96, L. 1915;
re-en. Sec. 2949, R. C. M. 1921.

Workmen's Compensation 1773.
71 C.J. Workmen's Compensation § 1081.

92-824. (2950) Power of board to award compensation and time and manner of payment. The board in its award may fix and determine the total amount of compensation to be paid, and specify the manner of payment, or may fix and determine the weekly disability indemnity to be paid, and order payment thereof during the continuance of such disability; providing, however, that the payment of such award and indemnity shall be in the same manner as that of undisputed awards and indemnities coming within the particular plan provided for in this act to which said award and indemnity belong.

History: En. Sec. 20, Ch. 96, L. 1915;
re-en. Sec. 2950, R. C. M. 1921.

Workmen's Compensation 1768 et seq.
71 C.J. Workmen's Compensation § 1079 et seq.

92-825. (2951) When a nominal disability indemnity may be awarded. If in any proceeding it is proved that an accident has happened for which the employer would be liable to pay compensation if disability has resulted therefrom, but it is not proved that an incapacity has resulted, the board may, instead of dismissing the application, award a nominal disability indemnity if it appears that disability is likely to result at a future time.

History: En. Sec. 20, Ch. 96, L. 1915;
re-en. Sec. 2951, R. C. M. 1921.

92-826. (2952) Jurisdiction to rescind or amend any order, decision, award, etc. The board shall have continuing jurisdiction over all its orders, decisions, and awards, and may, at any time, upon notice, and after opportunity to be heard is given to the parties in interest, rescind, alter, or amend any such order, decision, or award made by it upon good cause appearing therefor. Provided, that the board shall not have power to rescind, alter, or amend any final settlement or award of compensation more than four (4) years after the same has been made, and provided further that the board shall not have the power to rescind, alter or amend any order approving a full and final compromise settlement of compensation. Any order, decision, or award rescinding, altering, or amending a prior order, decision, or award, shall have the same effect as original orders or awards.

History: En. Sec. 20, Ch. 96, L. 1915;
re-en. Sec. 2952, R. C. M. 1921; amd. Sec. 9, Ch. 177, L. 1929; amd. Sec. 1, Ch. 67, L. 1937.

Additional Compensation for Continuing Disability

Where compensation had been awarded to an injured workman for temporary total and permanent partial disability for an amount less than the statutory maximum allowable, the industrial accident board had jurisdiction under this section and

NOTE.—For cases citing workmen's compensation act (secs. 92-101—92-1222) as an entirety, see references under sec. 92-101.

sec. 92-830, to entertain a petition of claimant for additional compensation covering continuing disability. *Paulich v. Republic Coal Co.*, 110 M 174, 181, 102 P 2d 4.

Continuing Jurisdiction on Final Settlement

Under this section and sec. 92-830 an order of the industrial accident board made on application for additional compensation, allowing such compensation but declaring that it should be "in full and final settlement" was unauthorized and did not preclude the board on a later application for compensation from exercising its continuing jurisdiction. *Meznarich v. Republic Coal Co.*, 101 M 78, 88, 53 P 2d 82.

Effect of Two Year Limitation After Lump Sum Settlement

Where the industrial accident board in 1931, after careful investigation and affording claimant full opportunity to present the facts relative to his injury, made a lump sum settlement, it was powerless, under this section, to reopen the case in 1935, after expiration of two years from the date of such settlement, upon request of claimant's attorney on the ground that all the injuries growing out of the accident had not been considered. *Williams v. Industrial Accident Board*, 109 M 235, 238, 97 P 2d 1115.

Operation and Effect

Under this section and sec. 92-830, the board has continuing jurisdiction over its orders and awards, and may amend and alter them to meet changed conditions of the injured party, even to the extent of entertaining a petition asking for a lump sum settlement after decision by the district and supreme courts upholding the award of the board. *State v. District Court*, 88 M 400, 403 et seq., 293 P 291.

Where the industrial accident board makes a final order, such as that because of the failure of the injured workman to file written notice of the accident resulting in his injury with his employer (insurer) as required by sec. 92-807, his claim is denied, as distinguished from an order interlocutory in character over which it, un-

der this section, has continuing jurisdiction, and the claimant fails to appeal therefrom, the matter becomes *res adjudicata* and may not thereafter be reopened. *State v. Industrial Acc. Board et al.*, 94 M 386, 389 et seq., 23 P 2d 253.

Where a claimant, more than two years after receipt of payment in full for injuries sustained, petitioned for rehearing on ground his original claim and proof of injury did not conform to the facts held (before amendment of this section) that board properly dismissed the petition for it was barred from altering a final settlement or award of compensation more than two years after it had been made. *Shugg v. Anaconda Copper Mining Co.*, 100 M 159, 167, 46 P 2d 435.

After a full and valid final compromise settlement of an injured workman's claim for compensation, the industrial accident board may not, upon expiration of the time limited by this section for presenting the petition, entertain a petition to re-open the matter for further allowance of compensation, the settlement being binding upon claimant and the board being then without jurisdiction to amend it. *Elich v. Industrial Accident Board*, 116 M 144, 146, 154 P 2d 793.

Power to Rescind Orders

No case in which compensation has been awarded under the workmen's compensation act shall be finally closed until the maximum period of payments for the disability for which the award was made has expired, except with respect to a final settlement after two years from the date of the order awarding compensation and in cases involving a compromise settlement. *Meznarich v. Republic Coal Co.*, 101 M 78, 88, 53 P 2d 82.

References

Landeon v. Toole County Refining Co., 85 M 41, 48, 277 P 615; *Magelo v. Industrial Accident Board*, 103 M 477, 478, 64 P 2d 113.

Workmen's Compensation—1778 et seq.
71 C.J. *Workmen's Compensation* § 1087.

92-827. (2953) Record of proceedings to be kept and testimony to be taken down—attorney's fees. A full and complete record shall be kept of all proceedings and hearings had before the board, or any member thereof, of any formal hearing had, and all testimony produced before the board or any member thereof shall be taken down by a stenographic reporter appointed by the board, and the parties shall be entitled to be heard in person or by attorney.

Whenever the claimant or plaintiff is represented by an attorney either before the board or the courts, the industrial accident board may, in its

discretion or upon the application of the claimant or plaintiff, fix the amount of the attorney fee of the attorney representing the claimant or plaintiff, and the fee fixed by the board shall be paid by the claimant or plaintiff.

In cases of an action to review any order or decision of the board, a transcript of such testimony, together with all exhibits, and of the pleadings, records, and proceedings in the cause shall constitute the record of the board.

History: En. Sec. 20, Ch. 96, L. 1915 re-en. Sec. 2953, R. C. M. 1921; amd. Sec. 4, Ch. 139, L. 1931; amd. Sec. 3, Ch. 162, L. 1937.

Provision Giving Industrial Accident Board Power to Fix Attorney's Fees Held Inoperative

This section as amended by sec. 4, chapter 139, laws 1931, provides that the industrial accident board "shall have power to fix and determine the amount of attorneys' fees to be allowed" in proceedings had before it under the workmen's compensation act "where an attorney appears for either party." It fails to state in whose favor and against whom or what fund the fees should be allowed. A claimant for compensation entered into a contract with an attorney under which the latter agreed to investigate the case and represent claimant in the district and supreme courts for a fee of \$500, his associate counsel to act in the proceeding before the board. That claim was allowed and the board in mailing a check for \$1,965 to associate counsel allowed his \$200 as his fee. Counsel first mentioned retained \$500 as his fee, without

objection by claimant. In a proceeding brought by him in the supreme court asking that the attorneys be disciplined for violation of the above amendment, held, that in the absence of a provision in the amendatory act declaring that a contract between an attorney and a compensation claimant fixing the fee to be paid shall be void, or a provision making such a contract subject to the approval of the board or the district court, the parties under secs. 93-2120 and 93-8601 were free to contract as to fees: held further, that by failure to provide in the amendment as to what fund the fee shall be paid from, or in whose favor or against whom it shall be allowed, the amendment is rendered so vague and uncertain as to be void, and that therefore the attorneys may not be held subject to discipline for an alleged violation of the statute. In re Maury et al., 97 M 316, 322, 34 P 2d 380.

Workmen's Compensation—1895 et seq., 1981.

71 C.J. Workmen's Compensation §§ 1219 et seq., 1343 et seq.

92-828. (2954) Collateral attack not permitted. No orders or decisions of the board shall be subject to collateral attack, and may be reviewed or modified only in the manner provided therein.

History: En. Sec. '20, Ch. 96, L. 1915; re-en. Sec. 2954, R. C. M. 1921.

When Petition and Appeal from Adverse Order Not Collateral Attack

A workman's petition for compensation in addition to that previously awarded to him and his appeal to the district court from an adverse order, do not constitute a collateral attack on the order of the industrial accident board, within the meaning of this section, declaring that

the orders or decisions of the board shall not be subject to such attack. Paulich v. Republic Coal Co., 110 M 174, 191, 102 P 2d 4.

References

Cited or applied as sec. 20 (h), chapter 96, laws of 1915, in Willis v. Pilot Butte Min. Co., 58 M 26, 35, 190 P 124.

Workmen's Compensation—1793.

71 C.J. Workmen's Compensation § 1107.

92-829. (2955) Application for rehearing. At any time within twenty days after the service of any order or decision of the board, any party or parties aggrieved thereby may apply for a rehearing upon one or more of the following grounds, and upon no other grounds:

- (1) That the board acted without or in excess of its powers;
- (2) That the order, decision, or award was procured by fraud;
- (3) That the evidence does not justify the findings;

(4) That the applicant has discovered new evidence, material to him, and which he could not, with reasonable diligence, have discovered and produced at the hearing;

(5) That the findings do not support the order, decision, or award;

(6) That the order, decision, or award is unreasonable.

History: En. Sec. 21, Ch. 96, L. 1915; re-en. Sec. 2955, R. C. M. 1921.

antee & Accident Co., 100 M 332, 336, 47 P 2d 456.

NOTE.—For cases citing workmen's compensation act (secs. 92-101 to 92-1222) as an entirety, see references under sec. 92-101.

Operation and Effect

Under this section aggrieved party is in same position as one moving for a new trial in an ordinary case as application relates only to the condition and situation prevailing at the time of the original hearing; grounds go to the merits of the order or decision rendered. *Shugg v. Anaconda Copper Mining Co.*, 100 M 159, 166, 46 P 2d 435.

Claimant not deprived of right to introduce additional evidence, on appeal to district court because his petition for rehearing addressed to industrial accident board did not set forth specifically what evidence he intended to introduce, or give his reasons why it had not been introduced at the original hearing. *Best v. London Guar-*

Res Adjudicata, When

The judgment of the board, as to conditions then existing, in the absence of a timely motion for a rehearing, or an appeal therefrom, is res adjudicata upon the issue which it determines. *Shugg v. Anaconda Copper Mining Co.*, 100 M 159, 170, 46 P 2d 435.

References

State v. District Court, 88 M 400, 403, 293 P 291; *Radonich v. Anaconda Copper Min. Co.*, 91 M 437, 446, 8 P 2d 658; *State v. Industrial Acc. Board et al.*, 94 M 386, 388 et seq., 23 P 2d 253; *State ex rel. Magelo v. Industrial Accident Board*, 102 M 455, 459, 59 P 2d 785; *Magelo v. Industrial Accident Board*, 103 M 477, 480, 64 P 2d 113; *Williams v. Industrial Accident Board*, 109 M 235, 242, 97 P 2d 1115.

Workmen's Compensation 1794 et seq.
71 C.J. *Workmen's Compensation* § 1108 et seq.

92-830. (2956) Board may at any time diminish or increase an award. Nothing contained in the preceding section shall, however, be construed to limit the right of the board, at any time after the date of its award, and from time to time after due notice and upon the application of any party interested, to review, diminish, or increase, within the limits provided by this act, any compensation awarded upon the grounds that the disability of the person in whose favor such award was made has either increased or diminished or terminated.

History: En. Sec. 21, Ch. 96, L. 1915; re-en. Sec. 2956, R. C. M. 1921.

NOTE.—For cases citing workmen's compensation act (secs. 92-101—92-1222) as an entirety, see references under sec. 92-101.

Additional Compensation for Continuing Disability

Where compensation had been awarded to an injured workman for temporary total and permanent partial disability for an amount less than the statutory maximum allowable, the industrial accident board had jurisdiction under this section and sec. 92-826, to entertain a petition of claimant for additional compensation covering continuing disability. *Paulich v. Republic Coal Co.*, 110 M 174, 181, 102 P 2d 4.

Disability When Held to Have Increased

Under this section, authorizing the board to increase compensation awarded a claimant where it appears that his disability has "increased" disability may be held to have increased where, though it has remained in a sense constant and unchanged, it is shown that it will continue to the end for which the state allows compensation. *Meznarich v. Republic Coal Co.*, 101 M 78, 91, 53 P 2d 82.

Operation and Effect

Under sec. 92-826 and this section the board has continuing jurisdiction over its orders and awards, and may amend and alter them to meet changed conditions of the injured party, even to the extent of

entertaining a petition asking for a lump sum settlement after decision by the district and supreme courts upholding the award of the board. *State v. District Court*, 88 M 400, 404, 293 P 291.

Held, before amendment of sec. 92-706, where industrial accident board, on the claim of an employee who lost no wages by his injury, assumed jurisdiction by allowing a physician's claim for medical services furnished employee, and it later developed that the employee had become totally blind in one eye, the board's jurisdiction on the claim continued so that it could award compensation for the loss of

the eye. *Gugler v. Industrial Accident Board*, 117 M 38, 45, 156 P 2d 89.

References

Landeem v. Toole County Refining Co., 85 M 41, 48, 277 P 615; *State v. Industrial Acc. Board et al.*, 94 M 386, 388 et seq., 23 P 2d 253; *Shugg v. Anaconda Copper Mining Co.*, 100 M 159, 166, 167, 46 P 2d 435.

Workmen's Compensation 1990 et seq.
71 C.J. *Workmen's Compensation* § 1381 et seq.

92-831. (2957) Application for rehearing—contents—rules of procedure.

The application for rehearing shall set forth specifically and in full detail the grounds upon which the applicant considers said order, decision, award, rule, or regulation to be unjust, or unlawful, and shall in other respects conform to such rules and regulations as the board may prescribe. The board shall have full power and authority to make and prescribe rules to govern the procedure upon rehearing, and any matter before it and any order made after such rehearing abrogating or changing the original order shall have the same force and effect as an original order, and shall not affect any right, or enforcement of any right, arising from or by virtue of the original order.

History: En. Sec. 21, Ch. 96, L. 1915; re-en. Sec. 2957, R. C. M. 1921.

NOTE.—For cases citing workmen's compensation act (secs. 92-101 to 92-1222) as an entirety, see references under sec. 92-101.

References

Radonich v. Anaconda Copper Min. Co., 91 M 437, 446, 8 P 2d 658; *Best v. London Guarantee & Accident Co.*, 100 M 332, 336, 47 P 2d 456.

92-832. (2958) Application for rehearing or appeal shall not operate as stay. An application for rehearing or the appeal hereinafter provided shall not excuse any employer, employee, or other person from complying with or obeying any order or requirement of the board, or operate in any manner to stay or postpone the enforcement of an order or requirement thereof, except as the board or the court may direct.

History: En. Sec. 21, Ch. 96, L. 1915; re-en. Sec. 2958, R. C. M. 1921.

NOTE.—For cases citing workmen's compensation act (secs. 92-101 to 92-1222) as an entirety, see references under sec. 92-101.

References

Radonich v. Anaconda Copper Min. Co., 91 M 437, 446, 8 P 2d 658.

Workmen's Compensation 1794 et seq.
71 C.J. *Workmen's Compensation* § 1108 et seq.

92-833. (2959) Appeal to district court. Within thirty days (30) after the application for a rehearing is denied, or, if the application is granted, within thirty days (30) after the rendition of the decision on the rehearing, and within twenty days (20) after notice thereof, any party affected thereby may appeal to the district court of the judicial district of the state of Montana, in and for the county in said state wherein the accident or injury occurred or the employer may have his place of residence, or if such employer be a corporation, may have its principal office or place of business, and said appeal shall be for the purpose of having the lawfulness of the

original order, decision, or award, or order, decision or award on rehearing inquired into and determined.

History: En. Sec. 22, Ch. 96, L. 1915; re-en. Sec. 2959, R. C. M. 1921; amd. Sec. 10, Ch. 177, L. 1929.

Jurisdiction of District Court

By sec. 92-715 the application of a beneficiary under the workmen's compensation act for conversion of monthly compensation payments into a lump sum payment is addressed to the discretion of the industrial accident board, and on appeal the district court in that behalf may act only in review of the action of the board thereon; therefore, where the beneficiary (widow) had asked for conversion but the board had not acted upon the request at the time the insurance carrier appealed from the award made and the district court heard the appeal upon the record certified by the board, which did not disclose that the board had made investigation as to whether or not the widow's request should or should not be granted, the court exceeded its jurisdiction in directing a lump sum payment. *Landeen v. Toole County Refining Co.*, 85 M 41, 48, 277 P 615.

Where the district court exceeds its jurisdiction in entertaining an application for writ of prohibition, and application is made to the supreme court for like relief by the aggrieved party, there is no reason why the latter tribunal should permit the former to proceed in an attempt to exercise jurisdiction which it does not possess and await its action before exercising its discretion in entertaining relator's application. *State v. District Court*, 88 M 400, 402, 293 P 291.

Proof of Continuing Disability on Appeal

Under unauthorized order of industrial accident board that compensation allowed be considered final, claimant was properly permitted to produce additional evidence on appeal to district court relative to the continuing character of her disability at the expiration of the period fixed by the board. *Koski v. Murray Hospital*, 102 M 109, 113, 56 P 2d 179.

Trial on Appeal

The trial on appeal to the district court from an order or reward made by the industrial accident board provided for by this section upon the certified record of the board, unless the court in the exercise

of its discretion shall permit additional evidence to be introduced, is de novo only to the extent it permits additional evidence to be introduced; if the cause is heard on the record of the board the re-examination is in the nature of a review; but in either event the court must render its own judgment irrespective of what has gone before. *Dosen v. East Butte Copper Min. Co.*, 78 M 579, 596, 254 P 880.

When Board May Be Reversed

On an appeal to the district court from an award made by the industrial accident board, the court should not reverse the findings of the board unless the evidence clearly preponderates against them, the board having been in a better position to determine of the credibility of the witnesses and the weight to be given to their testimony than can the court from an inspection of the record. *Morgan v. Butte Central Min. etc. Co.*, 58 M 633, 640, 194 P 496.

Where the evidence produced before the industrial accident board on the only issue in the case, i.e., whether a bartender, injured some distance from a city in an automobile accident in a car owned and driven by a female companion at 2:30 a. m. was acting in the scope of his employment to procure a supply of liquor for use at the resort, was in complete conflict, the finding of the court in favor of the board based on such evidence, will not be disturbed by the supreme court on appeal by the claimant, since the issue is one of credibility of the witnesses whom the board had an opportunity to observe while testifying and the board is in the same position as the district court in a nonjury or equity case. *Cartwright v. Industrial Accident Board*, 115 M 596, 147 P 2d 909.

References

Radonich v. Anaconda Copper Mining Co., 91 M 437, 447, 8 P 2d 658; *Rom v. Republic Coal Co.*, 94 M 250, 256, 22 P 2d 161; *State v. Industrial Acc. Board et al.*, 94 M 386, 388 et seq., 23 P 2d 253; *Meznarich v. Republic Coal Co.*, 101 M 78, 87, 53 P 2d 82.

Workmen's Compensation—1824.

71 C.J. Workmen's Compensation § 1122.

92-834. (2960) How appeal taken—notice—record—trial. Said appeal shall be taken by serving a written notice of said appeal upon the chairman of such industrial accident commission, or upon any other member thereof, which said service shall be made by the delivery of a copy of such notice to such chairman or member, and filing the original with the clerk of the

court to which said appeal is taken. A copy of such notice must also be served upon the adversary party, if there be any, by mailing the same to said adversary party to such address of such party as said party shall have left with the board. If such party shall have left no address with the board, then no service upon such party shall be required. The order of filing and service of said notice is immaterial. Immediately upon service upon said board of said notice, the said board shall certify to said district court the entire record and proceedings, including all testimony and evidence taken by said board, with the clerk of said district court. Immediately upon the return of such certified record, the district court shall fix a day for the hearing of said cause, and shall cause notice to be served upon the board and upon the appellant, and also upon the adversary party, if there be any. The court may, upon the hearing, for good cause shown, permit additional evidence to be introduced, but, in the absence of such permission from the court, the cause shall be heard on the record of the board, as certified to the court by it. The trial of the matter shall be *de novo*, and upon such trial the court shall determine whether or not the board regularly pursued its authority, and whether or not the findings of the board ought to be sustained, and whether or not such findings are reasonable under all the circumstances of the case.

History: En. Sec. 22, Ch. 96, L. 1915; re-en. Sec. 2960, R. C. M. 1921.

Record of Board

Claimant for compensation under the workmen's compensation act at whose instance on appeal to the district court the record and proceedings of the industrial accident board were introduced in evidence will not be heard to complain of the sufficiency of the certificate attached thereto, on appeal by his employer to the supreme court. *Dosen v. East Butte Copper Min. Co.*, 78 M 579, 596, 254 P 880.

Trial

The power given by this section is that of review rather than that of retrial. *Willis v. Pilot Butte Min. Co.*, 58 M 26, 34, 190 P 124.

The trial on appeal to the district court from an order or reward made by the industrial accident board provided for by sec. 92-833, upon the certified record of the board, unless the court in the exercise of its discretion shall permit additional evidence to be introduced, is *de novo* only to the extent it permits additional evidence to be introduced; if the cause is heard on the record of the board the re-examination is in the nature of a review; but in either event the court must render its own judgment irrespective of what has gone before. *Dosen v. East Butte Copper Mining Co.*, 78 M 579, 596, 254 P 880.

Claimant under the workmen's compensation act cannot, under sec. 93-5305, predicate error upon the court's failure to make findings on the trial of his cause on appeal

from an order of the industrial accident board, in the absence of a request for such findings. *Nicholson v. Roundup Coal Min. Co. et al.*, 79 M 358, 368 et seq., 257 P 270.

Id. The rule that the findings of the industrial accident board cannot be interfered with by the trial court on appeal if there is any evidence to support them does not apply to decisions on questions of law, and has application only where the appeal is determined upon the certified record made by the board; hence is inapplicable where the case is tried *de novo* and additional testimony is received showing conditions differing from those presented to the board.

Under the provisions of the workmen's compensation act the district court, on appeal from an order or award of the industrial accident board, must hear it on the certified record of the board, but may, in its discretion, permit new evidence to be introduced; if it does, the trial proceeds upon a consideration of the evidence heard by the board and that which the court permits in addition thereto, and the court must thereupon render its own judgment. *Mulholland v. Butte & Superior Min. Co.*, 87 M 561, 567, 289 P 574.

Where, on appeal by a claimant under the workmen's compensation act, to the district court from an order of the industrial accident board, the matter is submitted on the record made before the board, the hearing is in the nature of a review, but where additional evidence is heard, the trial as to it is *de novo*. *Murphy v. Industrial Accident Board*, 93 M 1, 6, 16 P 2d 705.

Where the purpose of an appeal by a claimant under the workmen's compensation act was to test the correctness of an order of the industrial accident board limiting the period of payment of the award allowed, the court did not err in permitting additional oral testimony of claimant's condition at the time of expiration of the period fixed by the board. *Sykes v. Republic Coal Co.*, 94 M 239, 243, 21 P 2d 732.

On appeal to the district court from a judgment of the industrial accident board denying compensation, held on the facts presented that the court did not abuse its discretion in permitting the introduction of additional testimony, though much thereof was repetitious resulting in effect in a trial de novo. *Tweedie v. Industrial Accident Board*, 101 M 256, 262, 53 P 2d 1145.

Trial de Novo—Meaning of Term

This section, in declaring that trial of a workman's compensation case in the district court on appeal from a decision of the industrial accident board shall be "de novo," does not mean a full retrial, but does mean that that court in deciding the case shall consider the evidence heard by the board and such additional evidence as it may admit, in rendering its judgment. *Woin v. Anaconda Copper Min. Co.*, 99 M 163, 174, 43 P 2d 663.

Id. The mere fact that additional evidence admitted by the district court on appeal of a workman in a compensation case was to some extent repetitious in character, held not to have resulted in a full trial de novo, under the last above rule.

What Constitutes "Good Cause"

Under the rule, prescribed by the workmen's compensation act, that all its parts shall be given a liberal construction, held that "good cause" for the admission of additional testimony on appeal from an award made by the industrial accident board is shown, in the absence of specific provision as to the manner in which it must be shown, by a presentation of the

reasons why it should be permitted, made in the presence of opposing counsel. *Sykes v. Republic Coal Co.*, 94 M 239, 243, 21 P 2d 732.

Under the provision of this section that on appeal to the district court from a ruling of the industrial accident board in a case arising under the workmen's compensation act, additional evidence may be admitted "for good cause shown," the party seeking to introduce such evidence is not required to present a verified motion supported by affidavits; an informal presentation of persuasive reasons for the request, made in the presence of opposing counsel, being sufficient to show "good cause." *Woin v. Anaconda Copper Min. Co.*, 99 M 163, 174, 43 P 2d 663.

Application to Introduce Additional Evidence on Appeal

Where claimant on appeal to district court at opening of trial and in presence of opposing counsel applied for leave to introduce additional testimony, and it appeared that opposing counsel had notice, the application would be made because he had been notified of and had participated in taking of depositions to be used on the trial, the application was timely and sufficient. *Best v. London Guarantee and Accident Co.*, 100 M 332, 338, 47 P 2d 456.

References

Edwards v. Butte & Superior Min. Co., 83 M 122, 124, 270 P 634; *Landeon v. Toole County Refining Co.*, 85 M 41, 48, 277 P 615; *Radonich v. Anaconda Copper Min. Co.*, 91 M 437, 442, 447, 8 P 2d 658; *Moffett v. Bozeman Canning Co.*, et al., 95 M 347, 359, 26 P 2d 973; *Shugg v. Anaconda Copper Mining Co.*, 100 M 159, 168, 46 P 2d 435; *Paulich v. Republic Coal Co.*, 110 M 174, 185, 102 P 2d 4.

Workmen's Compensation—1872 et seq.

71 C.J. Workmen's Compensation § 1195 et seq.

92-835. (2961) Appearances—setting aside conclusions, orders, etc., of board—judgment and findings. The board and each party to the action or proceeding before the board shall have the right to appear in the proceeding, and it shall be the duty of the board to so appear. If the court shall find from such trial, as aforesaid, that the findings and conclusions of the board are not in accordance with either the facts or the law, or that they ought to be other or different than those made by the board, or that any finding and conclusion, or any order, rule, or requirement of the board is unreasonable, the court shall set aside such finding, conclusion, order, judgment, decree, rule, or requirement of said board, or shall modify or change the same as law and justice shall require, and the court shall also

make and enter any finding, conclusion, order or judgment that shall be required, or shall be legal and proper in the premises.

History: En. Sec. 22, Ch. 96, L. 1915; re-en. Sec. 2961, R. C. M. 1921.

Court Not Required to Resubmit Cause to Board

The district court, after hearing a workmen's compensation case on appeal to it from the industrial accident board, where additional evidence is introduced, is not obliged to resubmit the case to the board in the light of such additional evidence, since under this section the court has the power to modify or change the decision of the board or render any order or judgment that shall be legal or proper in the premises. *O'Neil v. Industrial Accident Board*, 107 M 176, 184, 81 P 2d 688.

Lump Sum Settlement—When Court May Not Decide

Where a compensation claimant made no request to the industrial accident board for a lump sum settlement, and no evidence appeared in the record on appeal on the question of the necessity or advisability of such a settlement, the trial court properly declined to pass upon the question, and the supreme court on appeal to it will do likewise. *O'Neil v. Industrial Accident Board*, 107 M 176, 184, 81 P 2d 688.

Resubmission When Not Required

Claimant's request for a rehearing having been denied by the board, an appeal taken

to the district court, additional evidence admitted and judgment rendered in favor of claimant, the supreme court, on appeal, was not required to order resubmission of the case to the board, instead of affirming the judgment of the district court, the latter court being vested under this section with authority to render a proper judgment. *Tweedie v. Industrial Accident Board*, 101 M 256, 265, 53 P 2d 1145.

References

Cited or applied as sec. 22 (c), chapter 96, laws of 1915, in *Willis v. Pilot Butte Min. Co.*, 58 M 26, 35, 190 P 124; *Dosen v. East Butte Copper Min. Co.*, 78 M 579, 598, 254 P 880; *Edwards v. Butte & Superior Min. Co.*, 83 M 122, 124, 270 P 634; *Goodwin v. Elm Arlu Min. Co. et al.*, 83 M 152, 158, 269 P 403; *Landeen v. Toole County Refining Co.*, 85 M 41, 48, 277 P 615; *Mulholland v. Butte & Superior Min. Co.*, 87 M 561, 289 P 574; *Kearney v. Industrial Acc. Board*, 90 M 228, 235, 1 P 2d 69; *Radonich v. Anaconda Copper Min. Co.*, 91 M 437, 447, 8 P 2d 658; *Paulich v. Republic Coal Co.*, 110 M 174, 185, 102 P 2d 4.

Workmen's Compensation 1867 et seq. 71 C.J. *Workmen's Compensation* § 1188 et seq.

Necessity, form, and contents of findings of fact to support administrative determination. 146 ALR 123.

92-836. (2962) Appeals to supreme court. Either the board, or the appellant, or any adversary party, if there be one, may appeal to the supreme court of the state of Montana from any final order, judgment, or decree of the said district court, which said appeal shall be taken in like manner as appeals are now taken in other civil actions to the said supreme court, and upon such appeal the said supreme court shall make such orders in reference to a stay of proceedings as it finds to be just in the premises, and may stay the operation of any order, judgment, or decree of said district court, without requiring any bond or undertaking from the applicant for such stay. When any such cause is so appealed it shall have precedence upon the calendar of the said supreme court, and shall be tried anew by said supreme court upon the record made in said district court and before said board, and judgment and decree shall be entered therein as expeditiously as possible.

History: En. Sec. 22, Ch. 96, L. 1915; re-en. Sec. 2962, R. C. M. 1921.

Circumstances Under Which Supreme Court May Not on Own Motion Remand Cause to Industrial Accident Board for Taking of Further Testimony

Where claimant under the workmen's compensation act was represented by ex-

perienced counsel both at the hearing before the industrial accident board and on his appeal to the district court, which permitted him to introduce additional testimony, thereby strengthening the adverse decision of the board, that court, however, deciding in his favor on a finding not supported by the evidence, the supreme court may not of its own motion, under the pro-

visions of the act, in reversing the judgment direct the district court to remand the cause to the board for the taking of further testimony. (Justices Ford and Angstman dissenting.) *Radonich v. Anaconda Copper Mining Co.*, 91 M 437, 8 P 2d 658.

Constitutionality

This section is invalid to the extent that it attempts to confer authority on the supreme court to try the cause "anew" as though the matter was originally before the court. *Willis v. Pilot Butte Min. Co.*, 58 M 26, 34, 190 P 124.

Extent of Review

Where an appeal from an award of the industrial accident board is heard by the district court upon the record certified to it by the board, the supreme court in passing upon the sufficiency of the evidence will go no further than to ascertain whether there is any evidence to sustain the findings of the board and the trial court, and unless it clearly preponderates against the findings, it is its duty to sustain them. *Landeau v. Toole County Refining Co.*, 85 M 41, 277 P 615.

Jurisdiction

Where the district court exceeds its jurisdiction in entertaining an application for writ of prohibition, and application is made to the supreme court for like relief by the aggrieved party, there is no reason why the latter tribunal should permit the former to proceed in an attempt to exercise jurisdiction which it does not possess and await its action before exercising its discretion in entertaining relator's application. *State v. District Court*, 88 M 400, 293 P 291.

Where on appeal from an order of the industrial accident board denying compensation claimed due by the applicant under the provisions of the workmen's compensation act, the district court on the same record evidence, affidavits and written report of physicians made to the board, reversed the board's order and allowed compensation, the supreme court on appeal to it by the board, is in as favorable a position as either the board or the district court to pass on the merits of the controversy on the same record presented to it. *Kearney v. Industrial Acc. Board*, 90 M 228, 1 P 2d 69.

The final determination by the district court of the rights of the parties to a controversy arising between employer and employee with relation to an award made under the workmen's compensation act is

a judgment; hence where the court rendered its "judgment and order" awarding to the compensation claimant a sum of money covering the total of fifty-six weeks' compensation, that period having then expired, less payments already made, the result was a judgment, which was fully satisfied when the attorney of claimant accepted the amount of the award tendered by the clerk of court, acting as the agent of the employer, prior to appeal to supreme court, and therefore the attempted appeal will be dismissed. *Paulich v. Republic Coal Co.*, 97 M 224, 227, 33 P 2d 514.

Power of Supreme Court on Appeal

Quaere: May the supreme court in a workman's compensation case, where it is confronted on appeal by an extraordinary condition, factual or legal, in order to prevent a miscarriage of justice, remand the cause with direction that the industrial accident board grant the claimant a further hearing? *Radonich v. Anaconda Copper Min. Co.*, 91 M 437, 8 P 2d 658.

Time for Taking Appeal

The industrial accident board is not an "inferior court" within the meaning of sec. 93-8004 providing that an appeal from a judgment rendered on an appeal from an inferior court must be taken within ninety days after the entry of such judgment; hence failure of appellant to serve and file its notice of appeal within ninety days from the entry of the judgment of the district court on appeal from an order of the board does not warrant dismissal of the appeal to the supreme court. *Dosen v. East Butte Copper Min. Co.*, 78 M 579, 254 P 880.

When Not Bound by Findings of Trial Court

The supreme court is not bound by the findings of the trial court in an action by a claimant under the workmen's compensation act where the cause was tried on the record made by the industrial accident board without any additional evidence being introduced. *Goodwin v. Elm Orlu Min. Co. et al.*, 83 M 152, 269 P 403.

References

Mulholland v. Butte & Superior Min. Co., 87 M 561, 289 P 574; *Meznarich v. Republic Coal Co.*, 101 M 78, 87, 53 P 2d 82.

Workmen's Compensation—1954 et seq.
71 C. J. Workmen's Compensation § 1317 et seq.

92-837. (2963) Appropriations to carry out provisions of act. There is hereby appropriated out of the state treasury the sum of fifty thousand

dollars, or so much thereof as may be necessary, to be known as the industrial administration fund, out of which the salaries, traveling, and office expenses of the board shall be paid, and all other expenses incident to the administration of this act.

There is hereby appropriated out of the industrial accident fund such sums as may be necessary to pay the compensation provided for in this act.

History: En. Sec. 23, Ch. 96, L. 1915; re-en. Sec. 2963, R. C. M. 1921.

NOTE.—For cases citing workmen's compensation act (secs. 92-101 to 92-1222) as an entirety, see references under sec. 92-101.

References

Cited or applied as sec. 23 (a), chapter 96, laws of 1915, in *City of Butte v. Industrial Accident Board*, 52 M 75, 79, 156 P 130.

States ~~C~~ 129 et seq.

59 C.J. States § 380 et seq.

92-838. (2964) Court to give liberal construction to act. Whenever this act or any part or section thereof is interpreted by a court, it shall be liberally construed by such court.

History: En. Sec. 24, Ch. 96, L. 1915; re-en. Sec. 2964, R. C. M. 1921.

Liberally Construed in Favor of Claimant

Under this section, liberal construction of the general compensation law is a specific mandate. *Koppang v. Sevier*, 101 M 234, 245, 53 P 2d 455.

The compensation act and every part and section thereof is to be liberally construed. *Tweddie v. Industrial Accident Board*, 101 M 256, 263, 53 P 2d 1145.

Under this section the provisions of the workmen's compensation act must be liberally construed, which has been held by the supreme court to mean liberally construed in favor of the claimant. *Grief v. Industrial Accident Fund*, 108 M 519, 526, 93 P 2d 961.

No Justification for Disregarding Statutes

This section providing for liberal construction is no justification for disregarding plain statutory provisions of the workmen's compensation act relative to the time within which a petition for rehearing upon rejection of a claim by the board must be filed. *State ex rel. Magelo v. Industrial Accident Board*, 102 M 455, 462, 59 P 2d 785. See also *Shugg v. Anaconda Copper Mining Co.*, 100 M 159, 169, 46 P 2d 435.

Not to be Construed in Violation of General Code Provisions Relating to Statutory Construction

The liberal construction required by this section is not one which violates sec. 19-102 under which words shall be construed according to the context of a statute and approved usage of the language thereof, and sec. 93-401-15 which says that the office

of the judge is to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted, nor to favor the claimant regardless of the effect of the decision upon the act as a whole or upon its application in future cases, but rather to give effect to the general legislative purposes of the act as a whole. *Hendy v. Industrial Accident Board*, 115 M 516, 519, 521, 146 P 2d 324.

Operation and Effect

The workmen's compensation act must be construed as a whole to the end that each of its provisions may be given effect and its purposes accomplished, and while this section directs a liberal construction of its provisions, it is not meant thereby that either the industrial accident board or the courts may disregard its clear provisions. *Davis v. Industrial Accident Board*, 92 M 503, 511, 15 P 2d 919.

Where a coal miner in the course of his employment lost his left eye, receiving therefore full compensation under the provisions of the workmen's compensation act, and nine years later while working at the same occupation under a different employer again suffered an accident destroying the vision of his right eye, thus rendering him totally blind, he was, under a liberal construction of the act, entitled to compensation as for a total permanent disability for a period of 500 weeks, less payments previously received for 200 weeks, as against the contention that under the act he was only entitled to compensation for the loss of one eye. *McDaniel v. Eagle Coal Co. et al.*, 99 M 309, 312, 43 P 2d 655.

While the workmen's compensation act must be liberally construed, it does not contemplate that the employer shall be

an insurer of his employee at all times during the employment, nor is it founded on the theory of life insurance or a social insurance law. *Sullivan v. Roman Catholic Bishop et al.*, 103 M 117, 125, 61 P 2d 838.

Where claim was filed within time required by statute (sec. 92-601) but was defective because not under oath as required by the same statute, and was thereafter refiled under oath after the statutory period had run, since the act must be liberally construed (this section) and even under the strict rules of pleading and practice in the courts, verification of a pleading is not essential to vest jurisdiction in a court, held, that the board was in error in denying and dismissing the claim. *Chisholm v. Vocational School for Girls*, 103 M 503, 507, 64 P 2d 838.

Before amendment of sec. 92-706, held that board assumed jurisdiction by allowing physician's claim for medical services rendered employee who lost no wages by his injury so that board could subsequently award compensation for loss of injured eye notwithstanding sec. 92-601, under liberal

construction of this act in favor of beneficiaries as required by this section. *Gugler v. Industrial Accident Board*, 117 M 38, 47, 156 P 2d 89.

References

Cited or applied as sec. 24 (a), chapter 96, laws of 1915, in *City of Butte v. Industrial Accident Board*, 52 M 75, 78, 156 P 130; *Wirta v. North Butte Mining Co. et al.*, 64 M 279, 291, 210 P 332; *Dosen v. East Butte Copper Min. Co.*, 78 M 579, 598, 254 P 880; *Chmielewska v. Butte & Superior Min. Co.*, 81 M 36, 42, 261 P 616; *Edward v. Butte & Superior Min. Co.*, 83 M 122, 129, 270 P 634; *Maki v. Anaconda Copper Min. Co.*, 87 M 314, 321, 287 P 170; *Radonich v. Anaconda Copper Min. Co.*, 91 M 437, 439, 8 P 2d 658; *Murray Hospital v. Angrove*, 92 M 101, 113, 10 P 2d 577; *Sykes v. Republic Coal Co.*, 94 M 239, 244, 21 P 2d 732; *Meznarich v. Republic Coal Co.*, 101 M 78, 92, 53 P 2d 82.

Workmen's Compensation—51.

71 C.J. Workmen's Compensation § 67.

92-839. (2965) Effect of decision holding any part of act unconstitutional. If any section, subsection, subdivision, sentence, clause, paragraph, or phrase of this act is for any reason held to be unconstitutional or void, such decision shall not affect the validity of the remaining portions of this act, so long as sufficient remains of the act to render the same operative and reasonably effective for carrying out the main purpose and intention of the legislature in enacting the same, as such purpose and intention may be disclosed by the act.

History: En. Sec. 24, Ch. 96, L. 1915; re-en. Sec. 2965, R. C. M. 1921.

NOTE.—For cases citing workmen's compensation act (secs. 92-101 to 92-1222) as an entirety, see references under sec. 92-101.

Operation and Effect

Though part of this act may be invalid, that does not require the conclusion that

any other part of it is invalid, if, after the invalid part is eliminated, enough is left to accomplish all the purposes for which the legislation was enacted, particularly when this section is considered. *Shea v. North Butte Min. Co.*, 55 M 522, 538, 179 P 499.

States—64.

59 C.J. States § 251.

92-840. (2966) Money in industrial accident fund held in trust. The moneys coming into the industrial accident fund shall be held in trust for the purpose for which such fund is created, and if this act shall be hereafter repealed, such moneys shall be subject to such disposition as may be provided by the legislature repealing this act; in default of such legislative provision, distribution thereof shall be in accordance with the justice of the matter, due regard being had to obligations of compensation incurred and existing.

History: En. Sec. 24, Ch. 96, L. 1915; re-en. Sec. 2966, R. C. M. 1921.

NOTE.—For cases citing workmen's compensation act (secs. 92-101 to 92-1222) as

an entirety, see references under sec. 92-101.

References

Cited or applied as sec. 24 (c), chapter

96, laws of 1915, in *Willis v. Pilot Butte Min. Co.*, 58 M 26, 40, 190 P 124.

Workmen's Compensation \S 1045 et seq.
71 C.J. Workmen's Compensation \S 627 et seq.

92-841. (1967) Pending actions not affected by act. This act shall not affect any action pending or any cause of action existing on the thirtieth day of June, 1915.

History: En. Sec. 24, Ch. 96, L. 1915;
re-en. Sec. 2967, R. C. M. 1921.

Workmen's Compensation \S 55 et seq.
71 C.J. Workmen's Compensation \S 62 et seq.

92-842. (1968) Annual report — copies for general distribution. The board shall, not later than the first day of October of each year, make a report to the governor covering its entire operations and proceedings for the preceding fiscal year, with such suggestions or recommendations as it may deem of value for public information. A reasonable number of copies of such report shall be printed for general distribution.

History: En. Sec. 25, Ch. 96, L. 1915;
re-en. Sec. 2968, R. C. M. 1921.

92-843. (1969) When act to take effect. This act shall take effect and be in force from and after its passage and approval, except as to its compensation provisions, which shall not take effect until the first day of July, 1915.

History: En. Sec. 25, Ch. 96, L. 1915;
re-en. Sec. 2969, R. C. M. 1921.

Statutes \S 255.
59 C.J. Statutes \S 683.

CHAPTER 9

COMPENSATION PLAN NO. 1

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| Section | 92-901. When and how employer may elect to adopt—direct payment to employee. |
| | 92-902. Proof of solvency of employer electing plan No. 1 to be filed. |
| | 92-903. Employer permitted to carry on business and settle directly with employee —renewal of application. |
| | 92-904. Additional proof of solvency—revocation of order. |
| | 92-905. Requiring security of employer. |
| | 92-906. Failure of employer to pay compensation—duty of board. |
| | 92-907. When employer to make deposit or security to guarantee payment of compensation. |
| | 92-908. When employer may be relieved from liability. |

92-901. (1970) When and how employer may elect to adopt—direct payment to employee.

COMPENSATION PLAN NUMBER ONE

Any employer in the industries, trades, works, occupations, or employments in this act specified as hazardous, by filing his election to become, subject to and be bound by compensation plan No. 1, upon furnishing satisfactory proof to the board of his solvency and financial ability to pay the compensation and benefits in this act provided for, and to discharge all liabilities which are reasonably likely to be incurred by him during the fiscal year for which such election is effective, may, by order of the said board, make such payments directly to his employees as they may become entitled to receive the same under the terms and conditions of this act.

History: En. Sec. 30, Ch. 96, L. 1915;
re-en. Sec. 2970, R. C. M. 1921.

Workmen's Compensation 393 et seq.,
1058 et seq.

References

Paulich v. Republic Coal Co., 110 M 174,
176, 102 P 2d 4.

71 C.J. Workmen's Compensation §§ 259
et seq., 640 et seq.

92-902. (2971) Proof of solvency of employer electing plan No. 1 to be filed. Every such employer now or hereafter engaged in the state of Montana, in the industries, trades, works, occupations, or employments herein mentioned, and who shall have elected to be bound by such compensation plan No. 1, shall file such proof of his solvency within the time and such form as may be prescribed by the rules or orders of the board. The industrial accident board shall require a fee of five dollars (\$5.00) to be paid into the industrial administration fund for the filing of every such proof of solvency.

History: En. Sec. 30, Ch. 96, L. 1915;
re-en. Sec. 2971, R. C. M. 1921; amd. Sec.
5, Ch. 139, L. 1931.

92-903. (2972) Employer permitted to carry on business and settle directly with employee—renewal of application. If such employer, making such election, shall be found by the board to have the requisite financial ability to pay the compensation and benefits in this act provided for, then the board shall grant to such employer permission to carry on his said business for the fiscal year within which such election is made, and such proof filed, or the remaining portion of such fiscal year, and to make such payments directly to his employees as they may become entitled to receive the same. Every employer, so long as he continues in his said employment, and so long as he continues to be bound by such compensation plan No. 1, shall, at least thirty days before the expiration of each fiscal year, renew his application to be permitted to continue to make such payments as aforesaid directly to his employees for the next ensuing fiscal year, and under like circumstances as those mentioned for the granting of such permission upon such first application, the board may renew the same from year to year.

History: En. Sec. 30, Ch. 96, L. 1915;
re-en. Sec. 2972, R. C. M. 1921.

92-904. (2973) Additional proof of solvency—revocation of order. The board may at any time require from any employer acting under compensation plan No. 1 additional proof of solvency and financial ability to pay the compensation provided by this act, and may at any time, upon notice to such employer of not less than ten or more than twenty days, after and upon a full hearing, revoke any order or approval theretofore made.

History: En. Sec. 30, Ch. 96, L. 1915;
re-en. Sec. 2973, R. C. M. 1921.

92-905. (2974) Requiring security of employer. If said industrial accident board shall find that such employer has not financial responsibility for the payment of the compensation herein provided to be paid, which might reasonably be expected to be chargeable to such employer during the fiscal year to be covered by such permission, said industrial accident board must so find, and must require such employer, before granting to him such permission, or before continuing or engaging in such employment, subject

to the provisions of compensation plan No. 1, to give security for such payment, which security must be in such an amount as said board shall find is reasonable and necessary to meet all liabilities of such employer, which may reasonably and ordinarily be expected to accrue during such fiscal year. Said security must be deposited with the treasurer of the board, and may be a certain estimated per centum of said employer's last preceding annual pay-roll, or a certain per centum of the established amount of his annual pay-roll for said fiscal year or said security may be in the form of a bond or undertaking executed to said industrial accident board in the amount to be fixed by it with two or more sufficient sureties, which undertaking must be conditioned that such employer will well and truly pay, or cause to be paid, all such sums and amounts for which the employer shall become liable under the terms of this act to his employees during said fiscal year; or such security may consist of any state, county, municipal, or school district bonds, or the bonds or evidence of indebtedness of any individuals or corporations which the board may deem solvent; and every such deposit and the character and amount of such securities shall at all times be subject to approval, revision, or change by the board as in its judgment may be required, and upon proof of the final payment of the liability for which such securities are given, such securities, or any remaining part thereof, shall be returned to the depositor. The treasurer of the board and his bondsmen shall be liable for the value and safekeeping of all such deposits or securities, and shall, at any time, upon demand of the bondsmen or the depositor or the board, account for the same, and the earnings thereof.

History: En. Sec. 30, Ch. 96, L. 1915;
re-en. Sec. 2974, R. C. M. 1921.

92-906. (2975) Failure of employer to pay compensation—duty of board.

Upon the failure of said employer to pay any compensation provided for in this act, upon the terms and in the amounts and at the times when the same shall become due and payable, it shall be the duty of such state accident board, upon demand of the person to whom compensation is due, to apply any deposits made with the board to the payment of the same, and it shall be its duty to take the proper steps to convert any securities on deposit with the said board, or sufficient thereof, into cash and to pay the same upon the liabilities of said employer, accruing under the terms of this act, and it shall be its duty, in so far as the same shall be necessary, to collect and enforce the collection of the liability of all sureties upon any bonds which may be given by the said employer to insure the payment of his said liability. And to these ends, and for these purposes, the board shall be deemed to be the owner of said deposit and security and the obligee in said bond in trust for the said purposes, and may proceed in its own name to recover upon such bonds, or foreclose and liquidate said securities.

History: En. Sec. 30, Ch. 96, L. 1915;
re-en. Sec. 2975, R. C. M. 1921.

92-907. (2976) When employer to make deposit or security to guarantee payment of compensation. Within thirty days after the happening of an accident where death or the nature of the injury renders the amount of

future payments certain, or reasonably certain, the employer shall make a deposit or give security as herein defined with the treasurer of the board for the protection and guaranty of the payment of such liability, in such sum as the board may direct; provided, however, that if sufficient securities are already on deposit with the said board, or if the said board shall have determined that the employer has sufficient financial responsibility to meet said liability of the said employer, together with other liabilities already accrued, no such additional deposit or security shall be demanded.

History: En. Sec. 30, Ch. 96, L. 1915;
re-en. Sec. 2976, R. C. M. 1921.

92-908. (2977) When employer may be relieved from liability. Any employer against whom liability may exist for compensation under this act, may, with the approval of the board, be relieved therefrom by

(1) Depositing the present value or the estimated present value of the total unpaid compensation for which such liability exists, assuming interest at five per centum per annum, with the treasurer of the board; or

(2) Purchasing an annuity within the limitations provided by law, in any insurance company granting annuities, and authorized to transact business in this state, subject to the approval of the board.

History: En. Sec. 30, Ch. 96, L. 1915;
re-en. Sec. 2977, R. C. M. 1921.

CHAPTER 10

COMPENSATION PLAN NO. 2

- Section 92-1001. Employer electing plan No. 2 to insure his liability.
92-1002. Duty of employer electing plan No. 2—amount of insurance necessary.
92-1003. Policies to contain what.
92-1004. Agreement to be contained in policies of insurance—deposit of bonds.
92-1005. Policies made subject to this act—form of insurance.
92-1006. Renewals.
92-1007. Deposits by insurer with board.
92-1008. How insurer relieved from liability.
92-1009. Cancellation of insurance policy.
92-1010. Report of insurance companies to board.
92-1011. Policies to contain clause agreeing to do what—approval or change.
92-1012. Deposits under plan No. 2 as security.

92-1001. (2978) Employer electing plan No. 2 to insure his liability.

COMPENSATION PLAN NUMBER TWO

Any employer in the industries, trades, works, occupations, or employments in this act specified as hazardous, by filing his election to become subject to and bound by compensation plan No. 2, may insure his liability to pay the compensation and benefits herein provided for, in any insurance company authorized to transact such business in this state.

History: En. Sec. 35, Ch. 96, L. 1915; an entirety, see references under sec. 92-
re-en. Sec. 2978, R. C. M. 1921. 101.

NOTE.—For cases citing workmen's compensation act (secs. 92-101 to 92-1222) as

References

Murray Hospital v. Angrove, 92 M 101,

108, 10 P 2d 577; *Moffett v. Bozeman Canning Co. et al.*, 95 M 347, 349 et seq., 26 P 2d 973; *Anderson v. Amalgamated Sugar Co.*, 98 M 23, 37 P 2d 552; *Koski v.*

Murray Hospital, 102 M 109, 110, 56 P 2d 179; *Sullivan v. Roman Catholic Bishop et al.*, 103 M 117, 120, 61 P 2d 838.

92-1002. (2979) Duty of employer electing plan No. 2—amount of insurance necessary. Any employer electing to become subject to and bound by compensation plan No. 2 shall file with the board written acceptance of the provisions of compensation plan No. 2, together with a statement upon forms provided by the board of the nature of his employment, the character and location of his works, the number of men employed during the preceding year, or any part of the preceding year, and the probable number of men to be employed during the first fiscal year to be covered by such election, and the board shall thereupon determine the amount of insurance which will be reasonably necessary to secure the compensation with which the said employer may reasonably be expected to become chargeable during such fiscal year. And thereupon the said employer shall file the policy or policies of insurance herein provided for with the board, which policy or policies shall insure in the amount so fixed by the board against any and all liability of the employer to pay the compensation and benefits provided for in this act. The amount of such insurance shall be fixed by the board for each ensuing fiscal year during which said employer shall engage in his said employment, and shall remain subject to the provisions of compensation plan No. 2, and for the purpose of fixing such amount of said insurance, the said board may make all reasonable and necessary investigation, and the said employer shall furnish to such board all information which it may require.

History: En. Sec. 35, Ch. 96, L. 1915; re-en. Sec. 2979, R. C. M. 7921.

Directory Provisions

The provisions of this section prescribing the acts an employer electing to become subject to plan No. 2 must do, such as filing a written acceptance with the board,

the filing of the policy, etc., are directory, not mandatory, having nothing to do with the contract of the insurer imposing a liability to the injured employee, and failure to perform them does not inure to the benefit of the insurer. *Miller v. Aetna Life Ins. Co.*, 101 M 212, 221, 53 P 2d 704.

92-1003. (2980) Policies to contain what. All policies insuring the payment of compensation under this act, must contain a clause to the effect that as between the employee and the insurer the notice to, or knowledge of the occurrence of the injury on the part of the insured, shall be deemed notice or knowledge, as the case may be, on the part of the insurer; that jurisdiction of the insured for the purpose of this act shall be jurisdiction of the insurer; and that the insurer shall, in all things, be bound by and subject to the awards, orders, judgments, or decrees rendered against such insured. When any such policy, or a renewal thereof, is filed with the industrial accident board, the same shall be accompanied by a fee of three dollars (\$3.00), which fee is to be credited to the industrial administrative fund.

History: En. Sec. 35, Ch. 96, L. 1915; re-en. Sec. 2980, R. C. M. 1921; amd. Sec. 6, Ch. 139, L. 1931.

Payment of Compensation May Not Be Enforced by Execution

This section and secs. 92-1004 and 92-1012 provide a definite, certain and com-

prehensive method of enforcing payment of compensation awarded an employee under plan 2 and this method is exclusive, at least until it is shown to be fruitless. Therefore, writ of prohibition will issue to prevent levy of execution to enforce judgment of district court awarding compensation on appeal from the board. State ex

rel. Murray Hospital et al. v. District Court et al., 102 M 350, 355, 57 P 2d 813.

References

Miller v. Aetna Life Insurance Co., 101 M 212, 224, 53 P 2d 704.

92-1004. (2981) Agreement to be contained in policies of insurance—deposit of bonds. No such policy shall be issued unless it contains the agreement of the insurer that it will promptly pay to the person entitled to compensation all the installments of compensation or other payments in this act provided for, and that the obligation shall not be affected by any default of the insured after the injury, or by any default in the giving of any notice required by such policy or by this act or otherwise. Such agreement shall be construed to be a direct promise by the insured to the person entitled to compensation. Before issuance of any policy by an insurer as herein authorized, such insurer must deposit with the treasurer of the industrial accident board, bonds of the United States or the state of Montana, or of any school district, county, city or town in the state of Montana, in an amount not less than five thousand dollars (\$5,000.00) or more than twenty thousand dollars (\$20,000.00), as the industrial accident board may determine. If any insurer shall fail to discharge any liability after the amount thereof shall be determined by the board, and within the time limited by the board, it shall be the duty of the board to convert said bonds, or such part thereof as is necessary, into cash, and from the proceeds liquidate such liability; and thereafter said insurer must make an additional deposit to meet any deficiency caused thereby. It is intended hereby to give the industrial accident board the discretion in the matter of whether an insurer has failed to discharge any liability.

History: En. Sec. 35, Ch. 96, L. 1915; amd. Sec. 10, Ch. 100, L. 1919; re-en. Sec. 2981, R. C. M. 1921; amd. Sec. 11, Ch. 177, L. 1929.

References

Moffett v. Bozeman Canning Co., et al., 95 M 347, 357, 26 P 2d 973; Miller v. Aetna Life Ins. Co., 101 M 212, 224, 53 P 2d 704.

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1012 provide a definite, certain and comprehensive method of enforcing payment of compensation awarded an employee under plan 2 and this method is exclusive, at least until it is shown to be fruitless. Therefore, writ of prohibition will issue to prevent levy of execution to enforce judgment of district court awarding compensation on appeal from the board. State ex rel. Murray Hospital et al. v. District Court et al., 102 M 350, 355, 57 P 2d 813.

92-1005. (2982) Policies made subject to this act—form of insurance. Every policy for the insurance of the compensation herein provided for, or against liability therefor, shall be deemed to be made subject to the provisions of this act. No insurer shall enter into any such policy of insurance unless its form shall have been approved by the board, and as otherwise provided by law.

History: En. Sec. 35, Ch. 96, L. 1915; re-en. Sec. 2982, R. C. M. 1921.

92-1006. (2983) Renewals. Every renewal of such policy shall be made and delivered to said board at least thirty days prior to the expiration of the expiring policy.

History: En. Sec. 35, Ch. 96, L. 1915; re-en. Sec. 2983, R. C. M. 1921.

92-1007. (2984) Deposits by insurer with board. Within thirty days of the happening of an accident where death or the nature of the injury renders the amount of future payments certain or reasonably certain, the insurer shall make a deposit, as herein defined, with the treasurer of the board for the protection and guarantee of the payment of such liability in such sum as the board may direct; provided, that if the board deems the amount on deposit by said insurer under the provisions of section 92-1004 sufficient to cover all liabilities of the insurer, then no further deposit shall be required.

History: En. Sec. 35, Ch. 96, L. 1915;
amd. Sec. 11, Ch. 100, L. 1919; re-en. Sec.
2984, R. C. M. 1921.

92-1008. (2985) How insurer relieved from liability. Any insurer against whom liability may exist for compensation under this act, may, with the approval of the board, be relieved therefrom by

(1) Depositing the present value or the estimated present value of the total unpaid compensation for which such liability exists, assuming interest at five per centum per annum, with the treasurer of the board; or

(2) By purchasing an annuity within the limitations provided by law in any insurance company granting annuities, and authorized to transact business in this state, subject to the approval of the board.

History: En. Sec. 35, Ch. 96, L. 1915;
re-en. Sec. 2985, R. C. M. 1921.

92-1009. (2986) Cancellation of insurance policy. No policy of insurance issued under the provisions of compensation plan No. 2 shall be canceled within the time limited for its expiration except upon thirty days' notice to the employer in favor of whom such policy is issued, and to the board, unless such policy sought to be canceled shall have been sooner replaced by other insurance.

History: En. Sec. 35, Ch. 96, L. 1915;
re-en. Sec. 2986, R. C. M. 1921.

92-1010. (2987) Report of insurance companies to board. Every insurance company transacting business under this act shall, at the time and in the manner prescribed by the board, make and file with the board such reports of accidents as the board may require.

History: En. Sec. 35, Ch. 96, L. 1915;
re-en. Sec. 2987, R. C. M. 1921.

References

Herberson v. Great Falls Wood & Coal
Co., 83 M 527, 531, 273 P 294.

NOTE.—For cases citing workmen's compensation act (secs. 92-101 to 92-1222) as an entirety, see references under sec. 92-101.

92-1011. (2988) Policies to contain clause agreeing to do what—approval or change. Every policy or contract insuring against liability for compensation under compensation plan No. 2 must contain a clause to the effect that the insurer shall be directly and primarily liable to and will pay directly to the employee, or in case of death, to his beneficiaries, or major or minor dependents, the compensation, if any, for which the employer is liable. Every such policy shall at all times be subject to the approval,

change, or revision by the board, and shall contain the clauses, agreements, and promises required by this act.

History: En. Sec. 35, Ch. 96, L. 1915;
re-en. Sec. 2988, R. C. M. 1921.

References

Miller v. Aetna Life Ins. Co., 101 M 212,
224, 53 P 2d 704.

92-1012. (2989) Deposits under plan No. 2 as security. Any deposit made under the provisions of compensation plan No. 2 shall be held in trust by the treasurer of the board as security for the payment of the liability for which the deposit was made. Such deposit may be reduced from time to time with the permission of the board, as the payment of the liability of the insurer may reduce the amount required to be on deposit. Such deposit may be changed or renewed when desired by the depositor, by withdrawing the same, or any part thereof, and substituting other deposits therefor; upon proof of the final payment of the liability for which such deposit was made, any deposit remaining shall be returned to the depositor. All earnings made by such deposit shall be first applied upon any liability of the depositors, and if no such liability exists, then such earnings shall upon demand be delivered to such depositor. The treasurer of the board and his bondsmen shall be liable for the value and safekeeping of such deposit, and shall at any time, upon demand of his bondsmen, the depositor, or the board, account for the same and the earnings thereof.

History: En. Sec. 35, Ch. 96, L. 1915;
re-en. Sec. 2989, R. C. M. 1921.

Payment of Compensation May Not Be Enforced by Execution

This section and secs. 92-1003 and 92-1004 provide a definite, certain and comprehensive method of enforcing payment of compensation awarded an employee un-

der plan 2 and this method is exclusive, at least until it is shown to be fruitless. Therefore, writ of prohibition will issue to prevent levy of execution to enforce judgment of district court awarding compensation on appeal from the board. State ex rel. Murray Hospital et al. v. District Court et al., 102 M 350, 355, 57 P 2d 813.

CHAPTER 11

COMPENSATION PLAN NO. 3

- Section 92-1101.** What necessary in electing plan No. 3—percentage of pay-roll to be paid in under plan.
- 92-1102.** Permitting employers in certain nonhazardous occupations to elect to comply and come under the provisions of plans 2 and 3 of this act—classification of such employers and their employees.
- 92-1103.** Computation of assessments.
- 92-1104.** What classification advisory only and subject to rearrangement, etc.
- 92-1105.** Intent and purpose of plan No. 3—fund to be paid for what purpose only—accounts.
- 92-1106.** Initial payment July 15, 1915.
- 92-1107.** Manner and time of making payments by employers.
- 92-1108.** In case of default, rates to be advanced twenty-five per cent.
- 92-1109.** Changes in classification of risks to be equalized.
- 92-1110.** Deficiency in industrial accident fund.
- 92-1111.** Amount to be set apart when required payment reasonably certain.
- 92-1112.** Investment of reserve—payment of instalments.
- 92-1113.** Treasurer to keep accounts of segregations.
- 92-1114.** Collection in case of default by employer—cancellation of right to operate under plan No. 3 for failure to pay premium.
- 92-1115.** Injury happening while employer is in default.
- 92-1116.** Assignment of cause of action to state.
- 92-1117.** Prosecution or settlement of cause of action.

- 92-1118. Application for compensation under plan No. 3.
- 92-1119. Payment of physician.
- 92-1120. Application in case of death.
- 92-1121. What included in computing compensation in hazardous employment.
- 92-1121.1. Repealing clause—exception of persons hauling sugar beets and grains.
- 92-1122. Disbursements out of industrial accident fund—employer to pay warrant.
- 92-1123. Earnings and interest on deposits—treasurer to make no profit.

92-1101. (2990) What necessary in electing plan No. 3—percentage of pay-roll to be paid in under plan.

COMPENSATION PLAN NUMBER THREE

Every employer, subject to the provisions of compensation plan No. 3 shall, in the manner and at the times herein specified, pay into the state treasury, in accordance with the following schedule, a sum equal to the percentage of his total annual pay-roll specified in this section; which said schedule is subdivided into classes, and the percentage of payments of premiums or assessments to be required from each of said classes is as follows:

Class 1. Broom or brush manufacturing, without sawmill; theatre stage employees; moving-picture operators; electrotyping; engraving; lithographing; photo-engraving; stereotyping; embossing; bookbinding; printing; jewelry manufacturing, not otherwise specified; sixty-five one-hundredths of one per centum.

Class 2. Cloth, textile, and wool manufacturing, not otherwise specified; wharf employees, other than stevedores and longshoremen; eight-tenths of one per centum.

Class 3. Manufacturing alcohol, drugs, other than ammonia; candy, crackers, saddles, harness, leather novelties, mattresses, not including springs or wire, paint, varnish, wagons, buggies, carriages, sleighs, cutters; operation of tugs and steamboats; manufacturing roofing paper and articles of paper not otherwise specified, paper boxes, automobiles, motor-trucks, hardware; working in rubber, not otherwise specified; manufacturing boots and shoes; manufacturing articles of and working in leather not otherwise specified; one and three-tenths per centum.

Class 4. Manufacturing cheese, condensed milk; operating creameries, manufacturing spices and condiments; paper-hanging; calcimining; white-washing; making willow baskets; setting tiles; mantles and marble work, inside work only; making grease, lard, soap, tallow; inside plumbing work; installing heating systems; painting and decorating, inside work only; metal ceiling work; one and four-tenths per centum.

Class 5. Manufacturing glass; operating breweries, bottling works, grain warehouses, grain elevators; manufacturing articles of brass, copper, lead, and zinc; operating machine-shops, not otherwise specified; lathing, plastering; canneries of meat, fruit, vegetables, or fish, not including can manufacturing; cutting stone or paving blocks, other than in quarries, with or without machinery; installing electrical apparatus inside; installing fire-alarm apparatus inside; covering boilers or steam-pipes; concrete-laying in floors, street-paving or sidewalks, not otherwise specified; laying asphalt and other paving not otherwise specified; including shop and yard; manu-

facturing canoes and rowboats; well-drilling; constructing and repairing of paving bricks or blocks; one and five-tenths per centum.

Class 6. Operating laundries with power, dyeing, bleaching, and cleaning works; manufacturing of furniture, show-cases, office and store furniture and fixtures; cabinet-making; manufacture of wire mattresses, bed-springs, wooden coffins, caskets, rough wooden boxes for coffins; building hothouses, working in foodstuffs, fruits, edible oils or vegetables, not otherwise classified; operating flour-mills, chop mills, feed mills; one and six-tenths per centum.

Class 7. Manufacturing wood fibre ware; installing automatic sprinklers or ventilating systems; setting glass; erecting fire-proof doors and shutters inside of buildings; operating tanneries, sugar factories; beveling glass; manufacturing peat fuel; building wooden stairs; manufacturing brick, including kilns and buildings and diggings in pits, brickettes, brooms with sawmills, earthenware, fire-clay, porcelain ware, pottery, tile, terracotta; brush making with sawmills; one and eight-tenths per centum.

Class 8. Manufacturing of ammonia; operating waterworks, gas-works; grading, either of streets or otherwise, or road-making, without blasting; construction of plank road, plank street or plank sidewalk; operating creosoting works, pile-treating works; treating ties or other timber products; plumbing, both at and away from the shop, including house connections, without blasting; construction of waterworks, gas-works, and coke-ovens, including laying of mains and connections, without blasting; one and nine-tenths per centum.

Class 9. Manufacturing artificial ice; operating refrigerator plants, cold-storage plants, foundries, packing-houses, including slaughtering; manufacturing agricultural implements, threshing machinery, traction-engines, harvesting machinery; manufacturing asphalt; operating steam-heating and power-plants; manufacturing gas or gasoline engines; operating ferries; stone crushing, not at quarries; boat or ship-building, other than canoes or rowboats, without scaffolds; laying hot flooring compositions, not otherwise specified; operating stock-yards; two per centum.

Class 10. Operating paper-mills, pulp-mills; longshoring, stevedoring, manufacturing fertilizers; operating garbage works; incinerators, crematories, lime-kilns or burners, no quarrying; installing boilers, steam-engines, dynamos, machinery not otherwise specified; putting up belts for machinery; manufacturing barrels, kegs, pails, staves, tubs, excelsior, veneer, packing-cases, sash, doors, and blinds; operation and maintenance of interurban railways, without third rail; two and two-tenths per centum.

Class 11. Millwrighting, not otherwise specified; manufacturing building material, not otherwise specified; working in building material, not otherwise specified; two and one-quarter per centum..

Class 12. Operation of smelters; manufacturing of metallic coffins; manufacturing of iron or steel; boat or ship rigging; planing-mills, independent; cement manufacturing; operating blast-furnaces; two and three-tenths per centum.

Class 13. Street or road-making, with blasting; manufacturing wood baskets; kindling-wood, window and door screens, cordage and rope; man-

ufacturing and refining oil; placing wires in conduits; two and four-tenths per centum.

Class 14. Concentrating and amalgamating of ores; woodworking, not otherwise specified; operating gravel bunkers; hauling gravel; operating gravel pits; operating wood-saws; painting, exterior work; operating boiler-works; making steam-shovels; boilers; shipwrighting; operating saw-mills, lath-mills; bridge-work factories; operation of and work in mines, other than coal; two and five-tenths per centum.

Class 15. Operating rolling-mills; manufacturing tanks, not otherwise specified; erecting and repairing advertising signs; harvesting and storing of ice, including loading on cars; making and repairing of locomotives and railroad cars; cutting stone at stone-yards connected with quarries; boat or ship-building with scaffolds; logging operations, with or without machinery; booming or driving logs, ties, or other timber products; operating shingle-mills; operating quarries; two and three-quarters per centum.

Class 16. Operating dredges; construction of telephone and telegraph systems; construction of dams and reservoirs, electric light and power-plants, water-works and water-systems; installing furnaces; constructing blast-furnaces; sewer-building, maximum depth of excavation at any point seven feet; operation and maintenance of steam railways, including logging railways; operating coal-mines; three per centum.

Class 17. Operating drydocks, including floating drydocks; ornamental metalwork within buildings; electric railway construction, without rock-work or blasting; railroad construction, including street and cable railways, without rockwork or blasting; building canals, without rockwork or blasting; installing freight or passenger elevators; operation of telephone and telegraph systems; making dredges; constructing drydocks; three and one-quarter per centum.

Class 18. Carpenters not otherwise specified; constructing grain elevators, not metal-framed; stump pulling with donkey-engines; steam, electric and cable railway construction, with rock-work or blasting; construction of logging railways, with rockwork or blasting; operation and maintenance of electric railways using third rail, and street railways, all systems, including electric and cable; operation and maintenance of electric light and power-plants, including transmission systems and extensions of lines; electric systems, not otherwise specified; three and one-half per centum.

Class 19. Pile-driving; clearing land with blasting; galvanized iron or tin-works; marblework; fire-proofing of buildings, by means of wire netting and concreting; cellar excavation, with or without blasting; three and three-quarters per centum.

Class 20. Constructing breakwaters, marine railways, and jetties; installation and repair of electrical apparatus, not otherwise specified, outside work only; stamping of metal or tin; building trestles and tunnels other than mining; shaft-sinking, not otherwise specified; four per centum.

Class 21. Moving safes, boilers, machinery; construction of tanks, water-towers, windmills, not metal frame; plumbers making house connections with blasting; roofwork; slate work; stonework; stone-setting; brick-work construction, not otherwise specified; construction of canals, with rock-

work or blasting; bridge-building, wooden; construction of floating docks; constructing chimneys of metal or concrete; four and one-half per centum.

Class 22. Excavations, not otherwise specified; laying of mains and connections, with blasting; sewer-building, where maximum depth of excavation at any point exceeds seven feet; blasting, not otherwise specified; manufacturing of fireworks; five per centum.

Class 23. Erecting fire-escapes, fire-proof doors, and shutters outside of buildings; building concrete structures, not otherwise specified; concrete or cement work not otherwise specified; six per centum.

Class 24. Constructing iron or steel frame structures or parts; constructing and repairing steel frames and structures; subaqueous works; caisson works; six and one-half per centum.

Class 25. House-moving, house-wrecking; construction or repair of steeples; construction of brick chimneys; six and three-quarters per centum.

Class 26. Manufacturing powder, dynamite, and other explosives, not otherwise specified; ten per centum.

Class 27. Any employer and his employees engaged in nonhazardous work or employment, by their joint election, filed with and approved by the board, may accept the provisions of compensation plan No. 3. In such event, such employer and employees shall be known as class 27, the rate of assessment in which shall be one-half of one per centum.

History: En. Sec. 40, Ch. 96, L. 1915; re-en. Sec. 2990, R. C. M. 1921.

NOTE.—For cases citing workmen's compensation act (secs. 92-101 to 92-1222) as an entirety, see references under sec. 92-101.

References

Cited or applied as sec. 40, chapter 96, laws of 1915, in *Lewis and Clark County v. Industrial Accident Board*, 52 M 6, 12, 155 P 268; *London G. & A. Co., Ltd. v. Indus. Acc. Bd.*, 82 M 304, 309, 266 P

1103; *Murray Hospital v. Angrove*, 92 M 101, 108, 10 P 2d 577; *Davis v. Industrial Accident Board*, 92 M 503, 505, 15 P 2d 919; *Paulich v. Republic Coal Co.*, 110 M 174, 176, 102 P 2d 4; *Griffin v. Industrial Accident Fund*, 111 M 110, 114, 106 P 2d 346; *Vesel v. Jardine Mining Co.*, 116 M 56, 62, 147 P 2d 906; *Hardware Mutual Cas. Co. v. Butler*, 116 M 73, 78, 148 P 2d 563; *Aleksich v. Industrial Accident Fund*, 116 M 127, 130, 151 P 2d 1016; *Elich v. Industrial Accident Board*, 116 M 144, 146, 154 P 2d 793.

92-1102. (2990.1) Permitting employers in certain nonhazardous occupations to elect to comply and come under the provisions of plans 2 and 3 of this act—classification of such employers and their employees. Any employer engaged in farming, dairying, agriculture, viticulture, horticulture, stock or poultry raising, may elect to comply with the provisions of plan 2 or 3 of this act and pay into the industrial accident fund the premiums provided in the act, in which event he shall not be liable to respond in damages at common law or by statute for injury or death of any employee during the period covered by such premiums and shall enjoy the benefits and privileges of this act. The employee of such employer shall be deemed to have elected to come under the provisions of this act unless such employee shall execute and file with the board on proper form to be furnished for that purpose, a specific election not to be so bound, in which event he shall not enjoy the benefits or privileges of this act until such election is withdrawn. Such employer shall be classified under the provisions of section 92-1104 as to rate of assessments, which assessment shall be paid in the manner and at the times specified under plan 2 or 3 of the workmen's compensation act.

History: En. Sec. 17, Ch. 121, L. 1925.

References

NOTE.—For cases citing workmen's compensation act (secs. 92-101 to 92-1222) as an entirety, see references under sec. 92-101.

London G. & A. Co., Ltd. v. Indus. Acc. Bd., 82 M 304, 309, 266 P 1103.

Workmen's Compensation 1045 et seq.
71 C.J. Workmen's Compensation § 627 et seq.

92-1103. (2991) Computation of assessments. If a single establishment or work comprises several occupations listed in the preceding section in different classifications, the assessment shall be computed according to the pay-roll of each occupation if clearly separable; otherwise an average rate of assessment shall be charged for the entire establishment, taking into consideration the number of employees and the relative hazards, provided that in no case shall any assessment levied under the provisions of this act be for a less amount than two and one-half dollars.

History: En. Sec. 40, Ch. 96, L. 1915;
amd. Sec. 6, Ch. 196, L. 1921; re-en. Sec.
2991, R. C. M. 1921.

92-1104. (2992) What classification advisory only and subject to re-arrangement, etc. The classification of hazardous occupations in section 92-1101 and the rates of premium or assessment therein fixed are advisory only, and the board is hereby given full power and authority to rearrange, revise, add to, take from, change, modify, increase, or decrease any classification or rate named in section 92-1101, as in its judgment or experience may be necessary or expedient; provided, that no change in the classification or rates prescribed in said section shall be made effective prior to the end of the first fiscal year, and thereafter any changes so made shall not become effective until thirty days after the date of the order or decision of the board making such change, except that in case of new industries, or industries not enumerated in section 92-1101, the board shall have the right to make an immediate classification thereof and establish a rate therefor.

History: En. Sec. 40, Ch. 96, L. 1915;
re-en. Sec. 2992, R. C. M. 1921.

92-1105. (2993) Intent and purpose of plan No. 3—fund to be paid for what purpose only—accounts. It is the intent and purpose of compensation plan No. 3 that each industry, trade, occupation, or employment coming under the provisions of said plan shall be liable and pay for all injuries happening to employees coming under the provisions of said plan, and that all funds collected by assessments as herein provided shall be paid into one common fund to be known as the industrial accident fund, which fund shall be devoted exclusively to the payment of all valid claims for injuries happening in each industry, trade, occupation, or employment coming under the provisions of compensation plan No. 3; provided, that accounts shall be kept with each industry, trade, occupation, or employment in accordance with the foregoing classifications, or otherwise, as the board may direct, both as to receipts and disbursements, for the purpose of providing information and statistics necessary for determining any changes in such rates or classifications.

History: En. Sec. 40, Ch. 96, L. 1915;
re-en. Sec. 2993, R. C. M. 1921.

92-1106. (2994) Initial payment July 15, 1915. There shall be collected from all classes as initial payment into the industrial accident fund, on or before the fifteenth day of July, 1915, one-fourth of the premium assessment for that fiscal year, and one-twelfth thereof at the first of each month beginning with October 1, 1915; provided, that if such fund shall have a sufficient balance on hand at the end of the first three months, or any month thereafter, to meet the requirements of the industrial accident fund, no assessment shall be called for such month.

History: En. Sec. 40, Ch. 96, L. 1915;
re-en. Sec. 2994, R. C. M. 1921.

92-1107. (2995) Manner and time of making payments by employers. The first payment shall be collected upon the pay-roll of the months of April, May, and June, 1915. At the end of each calendar year an adjustment of the the account shall be made upon the basis of the actual pay-roll. Any shortage shall be made good within thirty days thereafter. Every employer who shall enter into business at any intermediate day shall make his payments in the same manner and upon the same basis before commencing operations; the amount of such payments shall be calculated upon his estimated pay-roll, and an adjustment shall be made on or before February 1st in the year following, in the manner above provided.

History: En. Sec. 40, Ch. 96, L. 1915;
re-en. Sec. 2995, R. C. M. 1921.

92-1108. (2996) In case of default, rates to be advanced twenty-five per cent. Any employer who is in default in the observance of any order of the board, issued pursuant to the provisions of sections 92-1101 to 92-1107, inclusive, shall, in addition to any other penalty provided by this act, be charged an advance of twenty-five per centum over the established rate, and such advanced rate shall continue and be in force until such employer shall have ceased to be in such default.

History: En. Sec. 40, Ch. 96, L. 1915;
re-en. Sec. 2996, R. C. M. 1921.

92-1109. (2997) Changes in classification of risks to be equalized. Any change in classification of risks or premium rates, or any change caused by change in the class of work, occurring during the calendar year, shall be equalized by the board within thirty days after the end of such year in proportion to its duration in accordance with the schedules provided in this act.

History: En. Sec. 40, Ch. 96, L. 1915;
re-en. Sec. 2997, R. C. M. 1921.

92-1110. (2998) Deficiency in industrial accident fund. If, at the end of any year, it shall be seen that the contribution to the industrial accident fund by any class of industry shall be less than the drain upon such fund on account of that class, the deficiency shall be made good to the fund on the first day of February of the following year by the employers of that class, in proportion to their respective payments for the previous year.

History: En. Sec. 40, Ch. 96, L. 1915;
re-en. Sec. 2998, R. C. M. 1921.

92-1111. (2999) Amount to be set apart when required payment reasonably certain. Upon the happening of an accident where death or the nature of the injury renders the amounts of future payments certain, or reasonably certain, the board shall forthwith cause the treasurer of the board to set apart out of the industrial accident fund a sum of money, to be calculated on the basis of the maximum sum required to pay the compensation accruing on account of such injury, which will meet such required payments, not exceeding, however, the sum of four thousand dollars for any one case.

History: En. Sec. 40, Ch. 96, L. 1915;
re-en. Sec. 2999, R. C. M. 1921.

92-1112. (3000) Investment of reserve—payment of instalments. The treasurer of the board shall invest such reserve in bonds of the United States, bonds of the state of Montana, or bonds of any county, city, or school district in the state of Montana, or any other security which may be approved by said board, and out of the same and its earnings shall be paid the monthly instalments, and any lump sum, then or thereafter arranged for; provided, however, that when there is sufficient money in the industrial accident fund to meet such compensation payments, any surplus remaining may be placed in the industrial reserve fund and invested by the board in the securities specified in this section.

History: En. Sec. 40, Ch. 96, L. 1915;
amd. Sec. 7, Ch. 196, L. 1921; re-en. Sec.
3000, R. C. M. 1921.

92-1113. (3001) Treasurer to keep accounts of segregations. The treasurer of the board shall keep an accurate account of all such segregations of the industrial accident fund, and upon direction of the board shall divert from the main fund any sums necessary to meet monthly payments, pending the conversion into cash of any security, and in such case shall repay the same out of the cash realized from the security.

History: En. Sec. 40, Ch. 96, L. 1915;
re-en. Sec. 3001, R. C. M. 1921.

92-1114. (3002) Collection in case of default by employer—cancellation of right to operate under plan No. 3 for failure to pay premium. If any employer shall default in any payment to the industrial accident fund, the sum due may be collected by an action at law in the name of the state and such right of action shall be cumulative. The industrial accident board is hereby authorized, in its discretion, to cancel an employer's right to operate under plan three (3) of the workmen's compensation act for failure to pay the premiums due the industrial accident fund; provided, that when the industrial accident board makes an order cancelling an employer's right for failure to pay premiums to the industrial accident fund it shall be the duty of the industrial accident board to make such order at least sixty (60) days before the cancellation becomes effective and to send a formal notice to the sheriff or sheriffs of the county or counties where the employer is operating, and it shall be the duty of the said sheriff or sheriffs to post a notice in at least three (3) conspicuous places where the workmen can readily see said notices, to the effect that the industrial accident board has cancelled the right of the said employer to operate under the act, and said notice shall give the date of the effectiveness of said order. After said cancellation date the said

employer shall have the same status as an employer who is not enrolled under the workmen's compensation act.

When an employer's right to operate has been cancelled by the board for failure to pay premiums and when the board, in its discretion finds that the property and assets of said employer are not sufficient to pay said premiums, the board may compromise said claim for premiums and accept a payment of an amount less than the total amount due.

History: En. Sec. 40, Ch. 96, L. 1915;
re-en. Sec. 3002, R. C. M. 1921; amd. Sec.
1, Ch. 201, L. 1935; amd. Sec. 10, Ch. 235,
L. 1947.

References

Cited or applied as sec. 40 (m), chapter 96, laws of 1915, in *City of Butte v. Industrial Accident Board*, 52 M 75, 79, 156 P 130.

NOTE.—For cases citing workmen's compensation act (secs. 92-101—92-1222) as an entirety, see references under sec. 92-101.

92-1115. (3003) Injury happening while employer is in default. For any injury happening to any of his workmen during default in any payment to the industrial accident fund, the defaulting employer as to such injury shall be considered as having elected not to come under the provisions of this act, except that he shall be and remain liable to pay to the industrial accident fund the amount of such default, together with the penalty prescribed by section 92-1108.

History: En. Sec. 40, Ch. 96, L. 1915;
re-en. Sec. 3003, R. C. M. 1921.

References

Clark v. Olson, 96 M 417, 435, 31 P 2d 283.

92-1116. (3004) Assignment of cause of action to state. The person entitled to sue under the provisions of the preceding section shall have the option of proceeding by suit or taking under this act. If such person take under this act, the cause of action against the employer shall be assigned to the state for the benefit of the industrial accident fund. If such person shall elect to proceed against the defaulting employer, such election shall constitute a waiver of any right to compensation under the provisions of this act.

History: En. Sec. 40, Ch. 96, L. 1915;
re-en. Sec. 3004, R. C. M. 1921.

References

Clark v. Olson, 96 M 417, 435, 31 P 2d 283.

92-1117. (3005) Prosecution or settlement of cause of action. Any cause of action assigned to the state under the preceding section may be prosecuted or compromised by the board, in its discretion.

History: En. Sec. 40, Ch. 96, L. 1915;
re-en. Sec. 3005, R. C. M. 1921.

92-1118. (3006) Application for compensation under plan No. 3. Where a workman is entitled to compensation under compensation plan No. 3, he shall file with the board his application therefor, together with the certificate of the physician who attended him, and it shall be the duty of such physician to lend all necessary assistance in making application for compensation and such proof of other matters as may be required by the rules of the board without charge to the workman; provided, that the filing of a certificate of the attending physician shall not constitute a sworn claim for compensation.

History: En. Sec. 40, Ch. 96, L. 1915;
re-en. Sec. 3006, R. C. M. 1921; amd. Sec.
6, Ch. 213, L. 1945.

References

Gugler v. Industrial Accident Board, 117
M 38, 49, 156 P 2d 89.

92-1119. (3007) Payment of physician. For a proper compliance with the provisions of the preceding section, the physician, after approval by the board, shall be paid out of the industrial administration fund, one and one-half dollars for each case.

History: En. Sec. 40, Ch. 96, L. 1915;
re-en. Sec. 3007, R. C. M. 1921.

92-1120. (3008) Application in case of death. Where death results from the injury, the parties entitled to compensation under compensation plan No. 3, or some one in their behalf, shall make application for the same to the board. The application must be accompanied with proof of death and proof of relationship, showing the parties entitled to compensation, certificate of the attending physician, if any, and such other proof as may be required by the rules of the board.

History: En. Sec. 40, Ch. 96, L. 1915;
re-en. Sec. 3008, R. C. M. 1921.

92-1121. (3009) What included in computing compensation in hazardous employment. In computing the pay-roll, the entire compensation received by every workman employed in the hazardous occupations enumerated in this act, shall be included, whether it be in the form of salary, wage, piece-work, or otherwise, and whether payable in money, board or otherwise. Salary and wages paid during actual vacation period shall not be computed or assessed.

History: En. Sec. 40, Ch. 96, L. 1915;
re-en. Sec. 3009, R. C. M. 1921; amd. Sec.
11, Ch. 235, L. 1947.

92-1121.1. Repealing clause—exception of persons hauling sugar beets and grains. Nothing in this act shall be construed as repealing sections 92-201 and 92-202, and, provided further, that any person hauling or assisting in hauling of sugar beets or grains, in case of emergency, shall be considered engaged in casual employment and excepted from the provisions of this act.

History: En. Sec. 12, Ch. 235, L. 1947.

NOTE.—The repealing part of this section is omitted.

92-1122. (3010) Disbursements out of industrial accident fund—employer to pay warrant. Disbursements out of the industrial accident fund shall be made by the treasurer of the board as the board may order. If at any time there shall not be sufficient money in the accident fund with which to pay any warrants drawn thereon, the employer, on account of whose workmen the warrant was drawn, shall pay the same, and upon his next contribution to such fund he shall be credited with the amount so paid, with interest thereon at the rate of six per centum per annum from the date of such payment to the date upon which the next assessment becomes payable; and if the amount of the credit exceeds the amount of such assessment, he shall have a warrant upon such fund for the excess, and if said warrant

be not paid for want of funds, it shall be credited to such employer and be applied upon succeeding assessments.

History: En. Sec. 40, Ch. 96, L. 1915;
re-en. Sec. 3010, R. C. M. 1921.

92-1123. (3011) Earnings and interest on deposits—treasurer to make no profit. All earnings made by the industrial accident fund by reason of interest paid for the deposit thereof, or otherwise, shall be credited to and become a part of said fund, and the making of profit, either directly or indirectly, by the treasurer of the board, or any other person, out of the use of the accident fund shall constitute a felony, and on conviction thereof shall subject the person making such profit to imprisonment in the state penitentiary for a term not exceeding two years, or a fine not exceeding five thousand dollars, or both such fine and imprisonment, and the treasurer of the board shall be liable upon his official bond for all profits realized for any unlawful use of the said fund.

History: En. Sec. 40, Ch. 96, L. 1915;
re-en. Sec. 3011, R. C. M. 1921.

CHAPTER 12

SAFETY PROVISIONS

- Section 92-1201. Unsafe places for workmen forbidden.
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 92-1203. Jurisdiction and supervision of board over employment and places of employment.
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 92-1211. Fee for annual inspection to be paid by employer.
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 92-1217. Compliance with orders, directions, rules, etc., enjoined.
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 92-1220. Board may investigate cause of all industrial accidents—orders and recommendations concerning same.
 92-1221. When rate upon place may be advanced fifty per cent.
 92-1222. Violation of safety provisions a misdemeanor.

92-1201. (3012) Unsafe places for workmen forbidden.

SAFETY PROVISIONS

No employer shall construct, maintain, or operate, or cause to be constructed, maintained, or operated any place of employment that is not safe.

History: En. Sec. 50, Ch. 96, L. 1915; Master and Servant § 12.
re-en. Sec. 3012, R. C. M. 1921. 39 C. J. Master and Servant § 52.

92-1202. (3013) Removal of safety devices, etc., forbidden. No employee shall remove, displace, damage, destroy, or carry off any safety device or safeguard furnished and provided for use in any employment or place of employment, or interfere in any way with the use thereof by any other person, or interfere with the use of any method or process adopted for protection of any employee in such employment or place of employment, or fail or neglect to do anything reasonably necessary to protect the life and safety of himself and other employees.

History: En. Sec. 50, Ch. 96, L. 1915; Master and Servant ~~14~~.
re-en. Sec. 3013, R. C. M. 1921. 39 C.J. Master and Servant § 53.

92-1203. (3014) Jurisdiction and supervision of board over employment and places of employment. The board is vested with full power and jurisdiction over, and shall have such supervision of every employment and place of employment in this state as may be necessary adequately to enforce and administer all laws and all lawful orders requiring such employment and place of employment to be safe, and requiring the protection of the life and safety of every employee in such employment or place of employment.

History: En. Sec. 50, Ch. 96, L. 1915; Master and Servant ~~12~~, 14½; Workmen's Compensation ~~1086~~ et seq.
re-en. Sec. 3014, R. C. M. 1921.

References
39 C.J. Master and Servant §§ 52, 55; 71
Miller v. Aetna Life Ins. Co., 101 M 212, C.J. Workmen's Compensation § 662 et seq.
217, 53 P 2d 704.

92-1204. (3015) Powers of board regarding safety of employees. The board shall have power, in addition to other powers herein granted, by general or special orders, rules, or regulations, or otherwise:

1. To declare and prescribe such safety devices, safeguards, or other means or methods of protection as are well adapted to render employees and places of employment safe;

2. To fix such reasonable standards and to prescribe, modify, and enforce such reasonable orders for the adoption, installation, use, maintenance, and operation of safety devices, safeguards, and other means and methods of protection, as may be necessary for the protection of the life and safety of employees;

3. To fix and order such reasonable standards for the construction, repair, and maintenance of places of employment as shall render them safe;

4. To require the performance of any act necessary for the protection of life and safety of employees;

5. To declare and prescribe the general form of industrial accident reports, the accidents to be reported, and the information to be furnished in connection therewith, and the time within which such reports shall be filed. Nothing in this act contained shall be construed to prevent the board from requiring supplemental accident reports; provided, however, that where, by the laws of the state of Montana, the manner or method of carrying on any business, or the rules or regulations in relation thereto, or the character or kind of safety devices has been prescribed, no other or additional requirements shall be made by the board, but it shall be the duty of the board to see that the employer lives up to and obeys said laws.

History: En. Sec. 50, Ch. 96, L. 1915;
re-en. Sec. 3015, R. C. M. 1921.

References

Miller v. Aetna Life Ins. Co., 101 M 212,
217, 53 P 2d 704.

92-1205. (3016) Notice of hearing for purpose of considering and issuing general safety orders. Upon the fixing of a time and place for the holding of a hearing for the purpose of considering and issuing a general safety order or orders, the board shall cause a notice of such hearing to be published in one or more daily newspapers of general circulation, published and circulated in the state. No defect or inaccuracy in such notice or in the publication thereof shall invalidate any general order issued by the board after a hearing has been had.

History: En. Sec. 50, Ch. 96, L. 1915;
re-en. Sec. 3016, R. C. M. 1921.

92-1206. (3017) Places defined as hazardous to be inspected once each year. After July 1, 1915, every place of employment of a work or occupation defined by sections 92-301 to 92-306, inclusive, to be hazardous shall be inspected at least once during each year by an inspector or examiner appointed by the board. Such inspection shall be for the purpose of determining the condition and operation of such places of employment, as regards the safety of employees working therein, and the use of safeguards, safety appliances, and reasonably safe tools and appliances.

History: En. Sec. 51, Ch. 96, L. 1915;
re-en. Sec. 3017, R. C. M. 1921.

92-1207. (3018) Report of inspectors. A report of such inspection shall be filed in the office of the board, and a copy thereof given the employer.

History: En. Sec. 51, Ch. 96, L. 1915;
re-en. Sec. 3018, R. C. M. 1921.

92-1208. (3019) Certificate of safety of inspected places. Each place of employment inspected as provided in section 92-1206, and found in a satisfactory condition, shall receive from the board, upon payment of the inspection fees hereinafter provided for, a certificate to that effect, which certificate must be prominently displayed, under glass, in one of the principal places of the establishment so inspected.

History: En. Sec. 51, Ch. 96, L. 1915;
re-en. Sec. 3019, R. C. M. 1921.

92-1209. (3020) When board may order safety devices installed. If, after such inspection and report thereof to the board, it shall be found that any such place of employment is not constructed, maintained or operated as provided in this act, the board shall order the installation, use, maintenance, and operation, within such reasonable time as the board may direct, of such safety devices, safeguards, and other means and methods of protection as may be necessary to reasonably insure the safety of the workmen employed therein, subject to the provisions of the preceding section.

History: En. Sec. 51, Ch. 96, L. 1915;
re-en. Sec. 3020, R. C. M. 1921.

92-1210. (3021) When board or inspector may order place of employment closed and put in safe condition. If, after such inspection, the board or any inspector or examiner thereof shall find such place of employment in

such an unsafe condition as to constitute an immediate menace to the safety of the workmen employed therein, the board, or any inspector or examiner thereof, may order any such place of employment closed, or the work therein to cease, until such safety devices, safeguards, and other means and methods, or changes or removals, as may be ordered by the board, or any inspector or examiner thereof, shall have been installed, repaired, changed, or removed, and such place of employment put in such condition as will reasonably insure the safety of the workmen employed therein.

History: En. Sec. 51, Ch. 96, L. 1915; **References**
 re-en. Sec. 3021, R. C. M. 1921.

State ex rel. Nagle v. Page, 98 M 14, 37 P 2d 575.

92-1211. (3022) Fee for annual inspection to be paid by employer. For each annual inspection made under the provisions of this section, the employer shall pay, at the time of such inspection, a fee of five cents for each one thousand dollars or fraction thereof of his annual pay-roll for the preceding year; provided, that no inspection fee under this section shall be less than five dollars.

History: En. Sec. 52, Ch. 96, L. 1915; **References**
 re-en. Sec. 3022, R. C. M. 1921.

State ex rel. Nagle v. Page, 98 M 14, 37 P 2d 575.

92-1212. (3023) Fees in subsequent inspections. The fees for any subsequent or reinspection made during any year in which an annual inspection shall have been made shall be:

Where the annual pay-roll for the preceding year shall have been not more than twenty-five thousand dollars, five dollars;

Where the annual pay-roll for the preceding year shall have been more than twenty-five thousand dollars, but not more than one hundred thousand dollars, ten dollars;

Where the annual pay-roll for the preceding year shall have been more than one hundred thousand dollars, but not more than five hundred thousand dollars, twenty dollars;

Where the annual pay-roll for the preceding year shall have been more than five hundred thousand dollars, but not more than one million dollars, forty dollars;

Where the annual pay-roll for the preceding year shall have been more than one million dollars, fifty dollars.

History: En. Sec. 52, Ch. 96, L. 1915; **References**
 re-en. Sec. 3023, R. C. M. 1921.

State ex rel. Nagle v. Page, 98 M 14, 37 P 2d 575.

92-1213. (3024) Inspection fees and fines to be paid monthly into what fund. All fees received by the board for inspection, or for subsequent or reinspection, and all fines imposed or collected for a violation of the safety provisions of this act, shall be paid monthly to the state treasurer, who shall credit such payment to the industrial administration fund.

History: En. Sec. 52, Ch. 96, L. 1915;
 re-en. Sec. 3024, R. C. M. 1921.

92-1214. (3025) Orders concerning places and employments found to be unsafe. Whenever the board shall find that any employment or place of em-

ployment is not safe, or that the practice or means or methods of operation or processes employed or used in connection therewith are unsafe, or do not afford adequate protection to the life and safety of employees in such employments and places of employment, the board shall make and enter and serve such order relative thereto as may be necessary to render such employment or place of employment safe and protect the life and safety of employees in such employments and places of employment, and may in said order direct that such additions, repairs, improvements, or changes be made; and such safety devices and safeguards be furnished, provided, and used as are reasonably required to render such employment or places of employment safe, in the manner and within the time specified in such order.

History: En. Sec. 53, Ch. 96, L. 1915;
re-en. 3025, R. C. M. 1921.

92-1215. (3026) Board may grant time within which to comply with any order. The board may, upon application of any employer or other person affected thereby, grant such time as may reasonably be necessary for compliance with any order, and any person affected by such order may petition the board for an extension of time, which the board shall grant if it finds such an extension of time necessary.

History: En. Sec. 53, Ch. 96, L. 1915;
re-en. Sec. 3026, R. C. M. 1921.

92-1216. (3027) Board may summarily investigate places believed to be unsafe. Whenever the board shall learn, or have reason to believe that any employment or place of employment is not safe or is injurious to the welfare of any employee, it may summarily investigate the same, with or without notice or hearings, and enter and serve such order as may be necessary relative thereto.

History: En. Sec. 53, Ch. 96, L. 1915;
re-en. Sec. 3027, R. C. M. 1921.

References

Miller v. Aetna Life Ins. Co., 101 M 212,
217, 53 P 2d 704.

92-1217. (3028) Compliance with orders, directions, rules, etc., enjoined. Every employer, employee, and other person shall obey and comply with each and every requirement of every order, decision, direction, rule, or regulation made or prescribed by the board, and shall do everything necessary or proper in order to secure compliance with, and observance of every such order, decision, rule, or regulation.

History: En. Sec. 53, Ch. 96, L. 1915;
re-en. Sec. 3028, R. C. M. 1921.

References

Miller v. Aetna Life Ins. Co., 101 M 212,
217, 53 P 2d 704.

92-1218. (3029) Act not to deprive any other public corporation, board or department of jurisdiction. Nothing contained in this act shall be construed to deprive any other public corporation, board, or department of any power or jurisdiction over or relative to any place of employment; provided, that whenever the board shall, by order, fix a standard of safety for employments or places of employment, such order shall, upon the filing by the board of a copy thereof with the secretary or clerk of any such public corporation to which, or within whose jurisdiction it may apply, establish a minimum requirement concerning the matters covered by such order, and shall be con-

strued in connection with any local order relative to the same matter and to amend or modify any requirement in such local order not up to the standard of the order of the board.

History: En. Sec. 53, Ch. 96, L. 1915;
re-en. Sec. 3029, R. C. M. 1921.

92-1219. (3030) Orders, rules, findings, etc., of board as evidence. Every order of the board, general or special, its rules or regulations, findings, or decisions shall be admissible in evidence in any prosecution for, or suit to prevent the violation of any of the provisions of this act, and shall be presumed to be reasonable. This presumption is, however, a rebuttable presumption.

History: En. Sec. 53, Ch. 96, L. 1915;
re-en. Sec. 3030, R. C. M. 1921.

92-1220. (3031) Board may investigate cause of all industrial accidents—orders and recommendations concerning same. The board may investigate the cause of all industrial accidents occurring in any employment or place of employment, or directly or indirectly arising from or connected therewith, resulting in personal injury or death; and the board shall have the power to make such orders or recommendations with respect to such accidents as may be just and reasonable; provided, that neither the order nor the recommendation of the board, nor any accident report filed with the board, shall be admitted as evidence in any action for damages, or any proceeding to recover compensation, based on or arising out of such injury or death.

History: En. Sec. 53, Ch. 96, L. 1915;
re-en. Sec. 3031, R. C. M. 1921.

92-1221. (3032) When rate upon place may be advanced fifty per cent. If, by reason of poor or careless management, or otherwise, any place of employment be unduly dangerous in comparison with other like places of employment, and the employer operating the same shall not have complied with the safety provisions of this act, and such employer shall be under compensation plan No. 3, the board, in addition to any other penalty provided by this act, shall advance the rate upon such place of employment fifty per centum, and such advanced rate shall continue and be in force until such place of employment shall have ceased to be unduly dangerous in comparison with other like places of employment, and such employer shall have obtained a certificate of the inspector or examiner provided for herein.

History: En. Sec. 53, Ch. 96, L. 1915;
re-en. Sec. 3032, R. C. M. 1921.

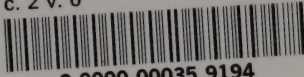
92-1222. (3033) Violation of safety provisions a misdemeanor. Every employer, employee, or other person, who either individually or acting as an officer, agent, or employee of a corporation, or other person, violates any safety provisions contained in this act, or any part of any such provision, or who shall fail or refuse to comply with any such provision or any part thereof, or who directly or indirectly, knowingly induces another so to do, is guilty of a misdemeanor.

History: En. Sec. 54, Ch. 96, L. 1915;
re-en. Sec. 3033, R. C. M. 1921.

Master and Servant—10 et seq.
39 C. J. Master and Servant § 35 et seq.

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